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Nos. 813, 814

IN THE

Supreme Court of the United States

October Term, 1966

CITY OF SCRANTON, et al.,
Appellant,
against
UNITED STATES OF AMERICA, et al.,
Appellees.

MILTON J. SHAPP,
Appellant,
against
UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from the United States District Court
For the Southern District of New York

JOINT APPENDIX TO BRIEFS FOR APPELLANTS

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November 30, 1966.

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TABLE OF CONTENTS

Brief of Pennsylvania Communities in Support of Interlocutory Injunction before the District Court .... Section A

Appendix 2 to Brief of Pennsylvania Communities in Support of Interlocutory Injunction before the District Court, consisting of Oral Argument of Leon H. Keyserling to Interstate Commerce Commission dated October 21, 1965 .... Section B

Memorandum of New Jersey Communities in Support of Interlocutory Injunction before the District Court .... Section C

Brief on behalf of Milton J. Shapp in Support of Motions for Issuance of an Interlocutory Injunction before the District Court .... Section D

Exhibit "A" to Supplemental Complaint of Milton J. Shapp before the District Court, consisting of portions of petition for reconsideration and for other relief filed July 11, 1966 with the Interstate Commerce Commission .. Section E

A

United States District Court

SOUTHERN DISTRICT OF NEW YORK

ERIE-LACKAWANNA RAILROAD COMPANY,
Plaintiff,
v.
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.
66 Civ. No. 2860

Brief of Pennsylvania Communities in Support of Interlocutory Injunction

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Preliminary Statement

This brief is filed on behalf of certain communities located in the Commonwealth of Pennsylvania, some of which were termed "jointly represented" in the April 6, 1966 report of the Interstate Commerce Commission in *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. at p. 483, 486, 495.

These communities ask that the court issue an interlocutory injunction pending decision on the merits of their complaint. Plaintiffs ultimately seek an order permanently enjoining the merger.

The interest of plaintiffs is discussed in the recommended report of the hearing examiners at sheets 256-259. The testimony and argument is largely dismissed as a matter of law, the examiners relying upon three decisions of the U.S. Supreme Court in interpreting the Transportation Act of 1920, as supplemented by the Emergency Railroad Transportation Act of 1933. *N.Y. Central Securities Co.* v. *United States*, 287 U.S. 12, 25 (1932); *Texas* v. *United States*, 292 U.S. 522, 531 (1933); *United States* v. *Lowden*, 308 U.S. 225, 230 (1939); (Recommended Report, sheets 280-286)

The erroneous views of the hearing examiners were apparently adopted by the Commission's April 6, 1966 report as those conclusions of the examiners which were not modified or rejected. (327 I.C.C. at pp. 481-2) The petitions for reconsideration filed by various Pennsylvania communities are specifically and individually mentioned at sheets 2, 6 and 27 of the report on reconsideration dated September 16, 1966.

The Interstate Commerce Commission errs as a matter of law in considering the evidence of various Pennsylvania communities irrelevant. Section 5(2)(c) sets forth four factors, *among others*, which must be evaluated by the Commission, and the decision of the Supreme Court in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) shows that the "public interest" is an evolving concept requiring the consideration of the Transportation Act of 1940 and subsequent legislation. Such legislation, for example, the Appalachian Regional Development Act of 1965, is an important enactment affecting transportation which requires the Commission to consider the effect of the merger upon plaintiff communities.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

The proposed merger of the Pennsylvania Railroad Company and New York Central Railroad Company is predicated upon adverse U.S. economic developments which, if they did not approximate calamity, would at least violate the forecasts of most accredited economists, mark the failure of all relevant national economic policies, and be highly injurious to our domestic and international needs.

The Commission states that it must be aware of the *probability* of economic imbalance and *recession*, and that its decision approving the merger, affecting a very substantial part of the Nation's future transportation, cannot be made with eyes closed to the very real *danger* that the U.S. economy may not always be as active and healthy as it is today. The Commission deems it prudent to take a look at economic history in view of the current optimism. (327 I.C.C. at pp. 497-8)

The report on reconsideration, dated September 16, 1966, continues the doom and gloom philosophy motivating the contraction of railroad facilities via merger. The Commission states that PRR and NYC are not assured of continuous operations at the 1966 level, and adds (sheet 11):

> "To postpone consummation of the merger which we approve because there is at present a high level of economic activity gambles unnecessarily and unjustifiably with the future of these lines and their ability to render essential services."

Contrary to the Commission, the real gamble, indeed the actual certainty, is that approval of the merger jeopardizes the future of the Eastern District—the industrial heartland of America. The Commission continues to budget transportation requirements downward. Indeed, the April 6, 1966 report projects that the combined traffic of PRR and NYC will drop from 89.2 billion ton-miles in 1965 to 71 billion ton-miles in 1970 based upon 1947-1965 trends, and to an even lower figure of 64 billion ton-miles based upon 1947-1963 data. (327 I.C.C. at p. 559)

These forecasts indeed would be consistent only with economic catastrophe; they would not be consistent even with some slackening of the rate of economic growth, nor even with some moderate recessions of the type experienced three times during 1953-1961.

Plaintiffs suggest that such dire projections are completely unsupported by substantial evidence and that, after trial on the merits, the decision approving the merger will be set aside pursuant to the requirements of the Administrative Procedure Act. The erroneous economics of the Commission are arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence.

The budgeting downward of needed capacity, particularly during an acute car shortage such as now exists, will create the very disaster that the Commission purports to guard against. Approval of the PRR-NYC merger, which would be the largest merger in U.S. corporate history, combining $6 billion in assets, gambles with the future of America, and with the maintenance of the United States as a great power. As counsel Keyserling stated during oral argument before the Commission:

> "We would have to have a great economic calamity during the next five years to make realistic these projections on which the merger is founded, and such a calamity would run so counter to all of our national purposes and objectives that it would mean the ending of the United States as a great power and a great power in world affairs." (Tr. 20,007-20,008)

The Interstate Commerce Commission has authorized the scrapping of needed railroad facilities based upon the dismal economic performance of the nation during the years 1953-61, and has extended such projections to the year 1970.

Attached hereto as appendicies 1 and 2 are materials distributed at the oral argument before the Interstate Commerce Commission on October 21, 1965 by counsel Leon H. Keyserling on behalf of the jointly represented Pennsylvania communities. Appendix 1 is "Excerpts from Leon H. Keyserling", and consists of a summary of his remarks. Appendix 2 is the argument itself. The entire oral argument was held over a two-day period, but the Commission only assigned 12 minutes to counsel Keyserling. The full text of the argument was, accordingly, distributed to the commissioners for their further study, but is not part of the official transcript of the oral argument.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF THE INTERLOCUTORY INJUNCTION IS NOT ISSUED

The short interval between issuance of the Commission's further report and order on September 19, 1966, and the hearing held before this court on September 21, 1966, did not permit plaintiffs the necessary time within which to consider the filing of affidavits demonstrating irreparable injury if the merger is allowed to become effective pending full hearing on the merits.

Injury, however, is implicit from the overall operational plan of the merger, which is to reduce railroad capacity throughout the Eastern District. As communities located in the Eastern District, plaintiffs will be adversely affected.

Injury also derives from inadequate protection afforded by the Commission for the plaintiff railroads serving Pennsylvania communities, such as E-L, D&H, and CNJ, which serve one or more of the plaintiffs herein. The report of the Commission, dated September 16, 1966, states that E-L, D&H and B&M "have raised valid issues as to interpretation, application, scope, and other aspects of the protection." (sheet 37) The indemnity provisions and traffic conditions of Appendix G to the April 6, 1966 report are made subject to further hearings, with the former being subject to retroactive application to the date of consummation of the merger.

But plaintiff communities are not entitled by the terms of the September 16, 1966 order to any damages suffered by diversion of traffic. They are not to be indemnified. Thus there can be no adequate remedy for the damage to plaintiff communities suffered during the period covered by further hearings. Diversion of traffic from E-L, D&H and CNJ will result in smaller railroad payrolls with the concomitant reduction in bank deposits, retail sales, real estate values, among other things, and adversely affect the business interest in plaintiff communities. Further, the prosperity of the railroads serving a community is one of the factors examined by industry in the selection of new plant sites or in the decision to expand or to close down existing facilities.

The recognition of damages for certain railroads, by holding further hearings, should be considered by this court as an acknowledgment by the Commission that the communities served by these railroads have no adequate remedy at law.

Any deficiencies in the showing of injury to plaintiffs within the meaning of *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921, is more than offset by the high probability of success on the merits. The cited decision holds that a higher probability of success on the merits will reduce the amount of injury necessary to support an interlocutory injunction.

III. THERE IS NO SUBSTANTIAL HARM TO PRR AND NYC

The argument of counsel Leon H. Keyserling before the Commission attached hereto as an appendix demonstrates that denial of the merger would actually benefit the two railroads. (Appendix 2, pp. 29, 38)

IV. THE PUBLIC INTEREST WILL NOT BE HARMED, BUT WILL BE BENEFITED BY ISSUANCE OF AN INTERLOCUTORY INJUNCTION

Leon H. Keyserling first appeared in the Commission proceedings as an economic witness tendered by the Railway Labor Executives Association in early 1963. He had agreed to undertake this assignment only after independent study had convinced him that the proposed merger would not be in the public interest, which includes not being compatible with legislative declarations of national public policy affecting transportation enacted subsequent to 1940. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80.

At the oral argument held October 21, 1965, counsel Keyserling appeared on behalf of the jointly represented

Pennsylvania communities in opposition to the merger. The conclusions of his analysis of the merger appears in Appendix 2 hereto at pages B1-B7. Of particular importance, at p. B2:

> ". . . the examiners did not allocate appropriate weightings to the various established national policies bearing upon mergers of this type and thus committed what I would regard as errors of law; that, even allowing for reasonable differences in judgment, the examiners did not correctly evaluate some of the important data, including especially the financial data, contained in the transcript of testimony in this case; that the examiners, in their proper desire to deal with facts rather than speculation, failed to recognize fully that in any case of this kind we must not only examine the past but also look into the future, and that, to the degree they looked into the future, the examiners appear to have accepted in vital respects an outlook as presented by the two railroads which has already turned out to be grossly erroneous, even while neglecting to attach much or any weight to projections made by some opponents of the merger, including myself, which have thus far turned out to be remarkably accurate.
>
> "More important still, I submit that the findings and order of the examiners, issued in March 1965, relied too heavily upon developments prior to the conclusions of my testimony in 1963, and did not take sufficient account of factual developments thereafter."

And finally, (Appendix 2, p. 7):

"(8) The proposed merger is therefore in conflict with the national policy of maximum employment, production, and purchasing power under the Employment Act of 1946, with our national transportation policies orientated to adequate railroad facilities and services, with the imperatives of our national defense problem, and with our dedication to free competitive enterprise as modified only by the realities of specific situations."

Chapters I through IV of Appendix 2, beginning at page B8 and concluding on page B36, develop in more detail the high points against the merger. The subsequent 30 charts are referred to in the text.

These 30 charts graphically illustrate that the examiners, and now the full Commission, have founded their approval of the merger upon an incorrect interpretation of the facts then available, and upon forecasts of subsequent developments which by October 21, 1965 had turned out to be shockingly erroneous. Particularly telling in this connection is *Chart 10*, which compares, on the basis of information available on October 21, 1965, the trends projected by Dr. Williams (the essential economic case upon which the railroads seeking merger relied, and upon which the examiners and Commission also relied) with the projections of witness Keyserling offered at the time of his original testimony in early 1963, and with actual developments as of October 21, 1965, which in the main validated the earlier projections of witness Keyserling.

Of equal significance in this connection are *Charts 11-19*, supporting the argument at pages B18-B28 of Appendix 2, indicating the meretricious nature of the financial assumptions underlying the proposed merger.

Plaintiffs call attention also to *Charts 20-23*, reinforcing pages B28-B33 of the argument in Appendix 2, which show that the merger represents an indefensible concentration of economic power.

The position of counsel Keyserling, as developed throughout, is that such a concentration of economic power might be justified if its real purpose were to enable the two railroads through consolidation to serve better the needs of the public and the nation and to put into effect lower per-unit charges. But the *avowed* purpose of the merger, not to speak of its *real* purposes, is to cut back on facilities, services, and employment, based upon forecasts as to the needs of an expanding economy, which forecasts have turned out to be abysmally wrong in all important respects. Further, the presumptions underlying the merger have been that the roads would continue the trend toward higher per-unit charges, which is not only injurious to the public, but is also an erroneous concept of what is best for the roads themselves. (Appendix 2, pp. B23-B24; *Chart* 17) These factors in the case make it clear that the roads seek the monopolistic power which the merger would confer, not to enable them to use this enlarged power for the public good, but rather to use this enlarged power in accord with the traditional utilization of monopolistic power along lines which have given rise to our manifold efforts to curb monopolistic power since the original inception of antitrust legislation.

Developments during the almost a year which has elapsed since oral argument on October 21, 1965 have further corroborated and demonstrated the entirely erroneous nature of the factual assumptions upon which the merger was proposed and approved. The following developments are most pertinent:

(1) The net railway operating income of the two railroads combined was $95.8 million in 1965.[1] Based upon seasonally unadjusted available data for the first half of 1966, it appears that the net railway operating income of the two railroads in 1966 will be at least in the neighborhood of $105 million.

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[1] The final data on the various types of income for 1965, as set forth herein, are considerably higher than those shown in Appendix 2. This is because, as of October 21, 1965, year 1965 estimates were made on the basis of unadjusted annual rates during the first half of the year. The fact that such estimates for 1965 proved to be *lower* than the final data for 1965 indicates the conservative nature of Appendix 2 and counsel Keyserling's projections, and also show that the actual financial progress made by the two railroads in 1965 further strengthens the argument of counsel Keyserling.

(2) The net income *after taxes* of the two railroads combined in 1965 was $75.4 million.[2] The seasonally unadjusted data for the first half of 1966 indicate that net income after taxes for the two railroads combined will be in the neighborhood of $86 million, or better, in 1966.

(3) The cash flow of the two railroads combined was $167.5 million in 1965. The seasonally unadjusted data for the first half of 1966 indicate that the cash flow of the two railroads combined for 1966 will be in the neighborhood of $180 million, or better.

(4) The total railroad operating revenue of the two railroads combined in 1955 was $1,554.1 million. The seasonally unadjusted data for the first half of 1966 indicate that the total railroad operating revenue of the two railroads for 1966 will be in the neighborhood of $1,560 million, or better. The very slight increase in total railroad operating revenue, combined with the very large increase in net railway operating income, net income after taxes, and cash flow, indicates that the two railroads have very greatly bettered their ultimate income position without sizeable increase in volume of business. These disparate trends further confirm the contention that the two railroads are following a policy designed to increase their ultimate income, not by the needed expansion of services, but rather by higher per-unit revenues. The disparate trends may also indicate gains in efficiency without benefit of merger, thus demonstrating the weakness of the claim that only merger can produce significant efficiency gains.

(5) Available data do not permit precise depiction of the trends in the facilities of the two railroads between 1965 and 1966. However, the indications are that PRR and NYC are continuing to budget downward their road mileage, and also their cars in service, thus running counter

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[2] This is a very conservative figure in that it treats PRR and NYC on a company basis rather than on a consolidated basis with their subsidiaries. Net income of PRR and NYC on a consolidated basis rose from $4.7 million in 1961 to $122.5 million in 1965.

to the real needs of the areas they serve and running consistent with the contractionist philosophy upon which the merger proposal has been founded from the outset.

(6) The immediately above conclusion is further reinforced by employment trends for PRR and NYC. Using 1939 as an index representing 100, the index of employment on PRR dropped from 62.3 in August, 1965 to 59.5 in July, 1966. The index of employment on NYC dropped from 52.3 in August, 1965 to 49.2 in July, 1966. These persistent downtrends in employment are not merely responsive to increasing productivity and efficiency; they represent in large measure the contractionist policy of the two railroads upon which the merger has been founded from the outset.

(7) More generally speaking, railroad developments on a nationwide basis during the most recent years have brought into sharp relief the general trend toward increasing the gap between needed railroad facilities and services and those actually made available. Freight car shortages have been serious, and have become acute in the face of pressures exerted when the U.S. needed to move more wheat because of accelerated exports to India and elsewhere, and when we needed to move troops and supplies to Florida at the time of the Cuban missile crisis. Our defense commitments and our international engagements are now more extensive and intense than in 1963 or 1965, and there is some prospect that this trend will continue in 1966 and 1967.

(8) As shown throughout the early 1963 testimony of witness Keyserling, and in his oral argument on October 21, 1965, the merger was proposed and originally approved by the examiners on the basis of the assumption that our average annual economic growth rate through 1970 and 1975 would persist at the abnormally low average annual rate of about 2.4 percent in real terms during 1953-1961. In vivid contrast, the average annual growth rate in real

terms during 1960-1965 was 4.5 percent; during 1962-1965, 4.7 per cent; and is now estimated to be in excess of 5 percent during 1964-1966. Only a major economic calamity, which the United States is straining every national policy to avoid, would drive the U.S. average annual growth rate so far downward that the estimates upon which the merger was advanced, and approved, could be translated into anything approximating reality.

The proposed merger is based upon the assumption that this calamity is an acceptable prospect; policies such as the proposed merger embodies could help to engineer such a calamity.

The public interest dictates that the court issue an interlocutory injunction to prevent irreparable damage to the national economy.

CONCLUSION

For the above stated reasons the Court should issue an interlocutory injunction pending final decision on the merits.

Respectfully submitted,
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B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

ERIE-LACKAWANNA RAILROAD COMPANY,
Plaintiff,
v.
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

66 Civ. No. 2860

Appendix 2 to Brief of Pennsylvania Communities

Oral Argument of Leon H. Keyserling before Interstate Commerce Commission in Opposition to Penn-Central Merger Thursday, October 21, 1965

May it please the Commission:

INTRODUCTION AND SUMMARY OF ANALYSIS AND CONCLUSIONS

I am Leon H. Keyserling, a consulting economist and attorney with offices at 1001 Connecticut Avenue, Washington, D.C.

I appear today at the request of certain communities opposing the Penn-Central merger, but I am convinced that what I shall say is also in the national public interest. Indeed, I submit that the central reason why this proposed merger would be acutely damaging to the legitimate interests of many specific communities is that the proposal is founded upon an approach to the railway transportation problem which would make consummation of the merger generally damaging to the national public interest. This being my view, I feel that I can be most serviceable here today to those who have asked me to represent them, and also most helpful to this Commission, by examining the proposed merger in terms of the national public interest. What is bad for the United States can hardly be good for many communities in the long run.

Another reason why I believe that I can be most helpful to this Commission by viewing the proposed merger in terms of the national public interest is that it was in these terms, after more than a year of intensive study on my part with very able staff assistance, that I testified for several days before the examiners in this case in early 1963. This was the whole nature of my testimony, even though in early 1963 I appeared on behalf of various railway organizations.

In the short time allotted to me here today, I cannot cover in full the ground which I covered in my testimony before the examiners in early 1963, and consequently I cannot today detail all of my reasons for disagreeing with the March 1965 findings and order of the examiners in approval of this proposed merger. Briefly, I respectfully submit that the examiners did not allocate appropriate weightings to the various established national polices bearing upon mergers of this type and thus committed what I would regard as errors of law; that, even allowing for reasonable differences in judgment, the examiners did not correctly evaluate some of the important data, including especially the financial data, contained in the transcript of testimony in this case; that the examiners, in their proper desire to deal with facts rather than speculation, failed to recognize fully that in any case of this kind we must not only examine the past but also look into the future, and that, to the degree they looked into the future, the examiners appear to have accepted in vital respects an outlook as presented by the two railroads which has already turned out to be grossly erroneous, even while neglecting to attach much or any weight to projections made by some opponents of the merger, including myself, which have thus far turned out to be remarkably accurate.

More important still, I submit that the findings and order of the examiners, issued in March 1965, relied too heavily upon developments prior to the conclusions of the testimony in 1963, and did not take sufficient account of factual developments thereafter. I respectfully submit that this Commission, in the national interest, should take proper notice of all of the truly important facts bearing upon this case to this very date. Whatever the legal or administrative technicalities may be, we are here engaged in the resolution of a matter of tremendous nationwide importance, and not merely playing a game of rules. For example, if we now found ourselves in an international crisis which would call imperatively for a new look at our entire national transportation system, it could hardly be argued that this should not enter into current consideration of the Penn-Central merger proposal because the testimony thereon was completed some time back. And I submit that there *have been* changes since 1963 in our national economic environment and outlook and in national economic policies, as well as in the transportation system in general and the conditions of these two railroads in particular, which have introduced what I believe to be controlling new factors bearing upon the appropriate disposition of this merger proposal.

In these connections, I feel it appropriate to state here today before this Commission that, in my view after studying carefully their entire analysis, findings, and order, the examiners took no meaningful account of the materials which I presented to them in 1963, and that these materials were entitled to far more consideration than they received because they (more than other materials available to the examiners) set the Penn-Central merger proposal in the perspective of the whole transportation problem in the United States, and in turn set that problem in the perspective of the performance and needs of the whole U. S. economy. In my testimony before the examiners I had ample time to deal with many technical problems which I cannot treat of today: for example, the whole problem of trends in the allocation of carriage among different types of carriers, and the problem of the relationships between economic and transportation problems in the Eastern District and in the U. S. at large. This Commission has available to it the record including this earlier testimony on my part. All that I can attempt here today is to highlight the main elements in my earlier analysis and conclusions, to bring these up to date in the light of subsequent developments, and to urge upon this Commission that what I said in 1963, based for the most part on data extending only through 1962, has been vindicated beyond my most sanguine expectations between now and then.

I should now make one point emphatically clear. Neither my testimony in early 1963 before the examiners in this case nor my current appearance is based on any general opposition on my part to industrial combinations or mergers. During my 33 years of activity in the field of national economic policies, I have always spoken out in favor of "bigness" when conducive to technological innovation, efficiency, and improved capabilities to serve the public interest. Nor have I ever failed to recognize that the application of the anti-trust and anti-monopoly policy to the railroads involves considerations different in some respects from those applicable to other industrial enterprises. Throughout my involvement in the Penn-Central matter, I have sought always to apply the criteria spelled out in relevant transportation legislation, as well as in Executive Orders, Messages, and other pronouncements of the President of the United States and those acting under his assignments.

Coming now to my analysis and conclusions, they converge upon the following prime points, interrelated in their nature:

(1) Partly in consequence of a U. S. economic performance during 1953-1961, or even 1953-1963, which was sorely below our national potentials and needs, and partly in consequence of an appraisal of railroad facilities and

service requirements far too low even in relationship to this sorely deficient U. S. economic performance, both Penn and Central (and other roads also) for many years budgeted their facilities, employment, and services far too low to comport with their own obligatory share of an adequate nationwide railroad service. And by an obvious interacting process, just as what was happening in the economy was injurious to the rails, what the rails did was injurious to the whole national economy;

(2) The Penn-Central merger proposal clearly indicated from the outset, and continues to indicate, a commitment to a substantially further downward budgeting of railway facilities, employment, and services. This, indeed, is admitted by the two roads, and in any event runs throughout the data and projections which they have presented. But this whole commitment has been predicated upon economic studies, advanced and relied upon by the two roads, which were demonstrably erroneous as of 1962-1963, and which have been refuted in entirety by subsequent general economic and railway developments. Increasingly since 1962, as we all know, a great sea change for the better has occurred in the entire U. S. economic performance. Herculean national-policy efforts, including legislative and administrative tax reductions or concessions having now an annual value approaching 20 billion dollars, have been made to improve the stability and accelerate the growth of our economy. A unique consensus with respect to economic policy has been achieved, augering well for the maintenance of this improvement in future, and lifting our reasonable expectations that chronic economic stagnation or frequently reoccurring recessions even of a mild nature will not be our misfortune in future. All of these heartening developments have already reflected themselves, not only in our thinking about transportation problems, but also in the vastly improved business and financial conditions of Penn and Central;

(3) For the foregoing reasons, the so-called "savings" or reductions in costs, claimed by the two roads in support of the proposed merger, should be viewed in a perspective entirely different from that made manifest by the examiners in this case. Even in my earlier 1963 testimony, I did not challenge the estimates as to the magnitudes of these so-called "savings" or cost reductions. Instead, I made two points. First, as I shall develop more fully subsequently, the achievement of these types of cost reductions does not get to the heart of the financial problems of these two roads, and their achievement through the particular means proposed would worsen rather than improve their financial returns in the long run. Second, "savings" or reductions in cost accruing to particular railroads offer no appropriate support to a merger proposal, if these "savings" or cost reductions are achieved through actions injurious to the national interest in adequate and expanding transportation facilities, employment, and services essential to meet the needs of an expanding economy and a growing population operating under conditions of maximum resource use. If it were otherwise, we might condone the entire liquidation of any particular complex of railroad facilities and services, solely or mainly on the ground that this would be the best out for their stockholders. I shall develop this point further in the course of my testimony;

(4) The merger proposal, and the 1965 order of the examiners, was founded excessively upon findings as to the financial conditions of the two railroads, with insufficient attention to the towering issue of adequate railroad facilities and services; a merger founded upon this approach would be hurtful rather than beneficial to the financial situation of these railroads; and this pessimistic financial finding on the part of the examiners was neither justified by the facts as of 1962-1963 nor supportable at all in terms of subsequent developments;

(5) The dominant economic and financial power which the proposed merger would accord to the two roads, once combined, would be inconsistent with our long-established and universally cherished national policy against the excessive concentration of such power and in favor of the promotion of free competitive enterprise, especially in view of the absence of justifiable support for the proposed merger on other grounds;

(6) The current international outlook, and the responsibilities which this imposes upon us as a nation and a people, render even more dangerous the contractionist policies embedded in the proposed merger;

(7) Insofar as the two roads need and deserve help toward further improvement in their financial position, such help has already been forthcoming in abundance, and will continue to be forthcoming along lines consistent with, rather than inimical to, the national public interest;

(8) The proposed merger is therefore in conflict with the national policy of maximum employment, production, and purchasing power under the Employment Act of 1946, with our national transportation policies orientated to adequate railroad facilities and services, with the imperatives of our national defense problem, and with our dedication to free competitive enterprise as modified only by the realities of specific situations.

For purposes of further simplification, my analysis and conclusions will be developed under these four main sections: that the merger proposal represents planning for stagnation rather than growth; that the financial assumptions underlying the proposed merger already have been proved egregiously wrong; that the proposed merger represents an indefensible concentration of economic power; and that the proposed merger violates every criterion of established national transportation policy.

I. THE MERGER PROPOSAL REPRESENTS PLANNING FOR STAGNATION RATHER THAN GROWTH.

My *Chart 1* points up that, during the period 1953-1960, the average annual growth rate of the U. S. economy in real terms was only 2.4 percent, which was little better than half of the average registered during relevant periods of reasonably full resource use after World War I. It was upon this abysmally low economic growth rate during this period that the downward budgeting of railway facilities and services on these two roads—as well as elsewhere—was fundamentally predicted, plus the assumption based upon erroneous forecasts (to which I will subsequently refer) that this abysmally low economic growth rate would continue indefinitely or even become worse. But the whole body of our nationwide economic efforts has been dedicated to the purpose of reversing this trend, so damaging at home and so perilous in view of the worldwide situation. Already, during the years 1960-1964, our average annual economic growth rate in real terms has been lifted to 4.3 percent, and to about 5 percent during the past year. And what we have learned about economic policies geared to stability and growth offers much promise that our economic growth rate will average even higher in the decade ahead. Manifestly, to predicate any sector of our national economic policy upon a contrary assumption would not only be wrong in principle, but would also contribute toward bringing about the very contingency which we must at all costs avoid.

My *Chart 2* depicts the now inapplicable transportation data which led to the conception of this proposed merger, and clearly influenced its approval by the examiners. This Chart shows how, from the end of World War II through 1961, both Penn and Central suffered serious declines in their carriage of interstate railway freight traffic, as did other U. S. lines. But this was partly in consequence of reconversion from World War II, partly in consequence of redistribution of business among various types of carriers, which I submit does not represent permanent or irreversible trends not subject to alleviation by a more activist and competitive policy on the part of the railroads themselves, and mainly in consequence of the abysmally low level of overall U. S. economic growth from 1953 to 1961. When I testified in 1963, I urged strongly that this adverse general economic trend would be reversed and that the other adverse trends could be reversed, and that the projection of these adverse trends was no sound ground for support of the proposed merger. The data on this Chart, revealing the annual rate of intercity railway freight traffic carried by these two roads during the first half of 1965, demonstrates how correct my forecasts were, and to this I shall refer again later on.

My *Chart* 3 shows how drastically both Penn and Central budgeted their facilities downward, not only from 1947 to 1953, but even more relevantly for our purposes from 1953 to 1961. By 1964, despite the sharp turnabout in the general economic situation, this downward budgeting by the two roads continued to be startlingly manifest, most alarmingly with respect to the number of freight-train cars in service. (My *Chart 4* is introduced merely for the purpose of showing that this downward budgeting of locomotives and freight-train cars in service has not been counterbalanced by the increases in locomotive tractive power and individual freight-car carrying capacity.)

My *Chart* 5 indicates the drastic downward budgeting in employment by the two roads from 1947 forward, gaining accelerating momentum during the years 1953-1961. This downward budgeting, as shown on the Chart, has continued through August, 1965, thus contributing not only to the inadequacy of railway services but also to the difficulties of restoring maximum employment throughout the whole economy. While I am unswervingly in favor of technological progress even when it displaces manpower, my entire analysis leads to the conclusion that these two roads—and the railroads in general—need more rather than less technological progress *and* manpower, if they are to meet the requirements of a sufficiently expanding economy and furnish a safe reserve capacity in view of the international situation. Moreover, we should learn to ask not only whether the railroads need a given level of manpower, but also where the manpower is to find jobs if not on the railroads.

Charts 6 and 7, presented when I testified before the examiners in 1963, contain my estimates of the huge differences between the actual traffic, income, freight cars, locomotives, and employment on the two roads during the period 1953-1961 and what these levels would have been under conditions of reasonably full resource use in the U. S. economy. Thus, these differences are in fact estimates of how far short the two roads fell in their facilities, employment levels, and income rewards below what these levels would have been in a reasonably growing U. S. economy. The validity of this exercise is illustrated by the estimates of "gaps" in our total national production by the Council of Economic Advisers. And this exercise has a direct and vital bearing upon how far short the two roads will fall of our true national requirements in future, if the policies embedded in the proposed merger prevail.

I now come to perhaps the most crucial part of what I have to say here today. When I testified in 1963, I presented my own projected estimates as to the traffic and income of Penn.and Central in 1965 and 1970, under alternative assumptions of high and low overall U. S. economic growth. My purpose in so doing was to contrast these estimates with the vastly different and defeatist projections put forward and relied upon by the two roads. My *Chart 8* shows not only my projections for 1965 and 1970 as of the time of my testimony in 1963, but also actual developments in 1964 and 1965. Taking into account that the progress of the economy during the last few years or so has been very encouraging but nonetheless far below the growth rate required to bring us back close to full resource use, my forecasts to a very high degree have been translated into actuality. *With respect to revenue ton-miles, compared with my high forecast of 89 billion for 1965 and my low forecast of 75.5 billion, the two roads actually carried 83.6 billion in 1964, and at an annual rate of 88.8 billion (virtually my high forecast) during the first half of 1965.* Revenue passenger-miles carried have continued to decline rather than to rise in accord with my forecast, but this represents a serious and continuing neglect of passenger carriage by the two roads. (I should point out also, in this connection, that my projections were not mere "forecasts" in the conventional sense, but rather goals to be equated with national needs. The same Chart shows that, with respect to net railway operating income after taxes, compared with my high forecast of 115 million and my low forecast of 44 million for 1965, the actual for the two roads was 73.4 million in 1964, and at an annual rate of about 98 million seasonally adjusted during the first half of 1965. This contrasts dramatically with 17.3 million in 1961, and with the forecasts of the main proponents of the merger that the deteriorating income situation would continue in the absence of the merger. Further, allowing for the fact that even now we are not nearly back to full resource use, and that the two roads have not yet reaped the full benefits of many measures to improve their incomes, the actual income figures for 1964 and the first half of 1965 are quite consistent with my forecast based upon that goal of full economic restoration which is our confirmed and dominant national economic policy. The same comments are applicable to the trends in net income after taxes for the two roads, which rose from a deficit of 9 million dollars in 1961 to a positive annual rate of about 66 million dollars seasonally adjusted in the first half of 1965, contrasted with my low projection of 16 million and my high projection of 80 million.

My *Chart* 9 contains my projections, as of 1963, with respect to needed equipment and employment on the two roads by 1965 and 1970, predicated upon optimum economic developments, and allowing for optimum technological trends and for desirable and attainable trends in the allocation of traffic among various types of carriers. The Chart shows that, as of 1964, despite the tremendous improvements in their business and incomes, the two roads have continued persistently to budget downward their facilities and employment. To any question as to how the two roads have been able to do this, and still carry the business which they have actually carried, the answer is plain: The business they have actually been carrying has been lamentably short of what they should be carrying. Communities have been neglected, services have been inadequate, shortages in some significant instances have become acute. These neglects and shortages are even more serious, when we consider the needs of the future on the necessary assumption of adequate economic growth and sustained restoration of optimum resource use.

And none of the foregoing takes fair account of the international situation today and its uncertainties in future. In my 1963 testimony, I pointed out that in the peak World War II year locomotive tractive power on Class 1 U. S. railroads was more than 29 percent above the 1961 level; and passenger-train cars in service about 75 percent above the 1961 level. It is a very conservative assumption that, in the event of a new major conflict involving us, our railroad transportation needs would be as great or greater than in 1944, and in all probability we would suffer destruction of existing facilities which remained untouched during World War II. Of course, this does not mean that we should now proceed to build our rail-carrying capabilities to levels approximating those which would be required in the awful event of major conflict. But it does mean, when we are now spending about 50 billion dollars a year for national defense and are soon to spend even more, that we should not view with equanimity the current railroad deficiencies nor encourage even larger deficiencies in line with the express purposes of the proposed merger. In the Eastern District, which would obviously be of vital importance in the event of major conflict, Penn and Central viewed together were in 1961 below their 1944 levels by 28 percent with respect to freight-car carrying capacity and 35 percent with respect to locomotive tractive power. The transcript of my 1963 testimony indicates that the Presidents of these two roads admitted (either before the examiners or in testimony before the Congress) that the then-current facilities of the two roads would fall short of the required traffic volume by some 200 billion ton-miles in the third year of a full mobilization. Even putting aside these terrible thoughts of a full-scale conflict, we know from recent experience how serious and sudden acute railroad shortages have occurred in the face of unexpected crises which were relatively limited in terms of the demands they imposed, for example the Cuban situation.

My *Chart 10* is perhaps the most telling of all. The two roads based their early 1963 advocacy of the proposed merger very substantially upon the trend projections of Dr. Williams, indicating for the future through 1970 a continuing deterioration in the position of the two roads by all recognized tests. When I testified in early 1963, I challenged vigorously the whole range of Dr. Williams' projections, relied upon so heavily by the two roads and apparently entering substantially into the thinking underlying the examiners' decision. My Chart indicates the huge magnitude of error in Dr. Williams' projections. He not only missed the mark, but moved in the wrong direction. *Using 1961 as a base year, Dr. Williams projected that freight traffic measured in revenue ton-miles on the two* *roads would be down 6.5 percent by 1965. In fact, this traffic was up 15 percent by 1964, and up 22.1 percent (annual rate) during the first half of 1965. This gain is exactly in line with my own high projection of 22.4 percent for 1965.* It should be noted also that Dr. Williams projected a decline in freight traffic of 9.2 percent, comparing 1970 with 1961. My projection for 1970 involves an optimum increase of 44.4 percent, and this now seems a reasonable expectancy in view of developments to date. The same *Chart 10* also indicates that, although the two roads have continued to budget their facilities and employment downward in a most undesirable fashion, for reasons already stated, the actual developments to date have come nowhere near approximating the defeatist projections of Dr. Williams. From the base year 1961, locomotives in service were down 6.2 percent by 1964, contrasted with trends consistent with Dr. Williams' projections that they would be down 10.5 percent by 1965, and 16.8 percent by 1970. Total employment by 1964 was down 9.5 percent, contrasted with trends consistent with Dr. Williams' projection that it would be down 16.1 percent by 1965 and 27.8 percent by 1970. Some of the other downward trends have exceeded Dr. Williams' projection, but this has resulted from inadequate services and inadequate preparation for the future, rather than from appropriate adjustments to our true railroad requirements.

In summary of this crucial phase of my analysis, I respectfully submit that careful examination of my exhibits today, my testimony in 1963, the projections made by Dr. Williams plus the evidence in the record that the two roads were in accord with Dr. Williams' projections and intending to act accordingly, and the analysis and findings of the examiners, will lead inescapably to the conclusion that the approval thus far of this proposed merger has been based upon ignoring the main thrust of the facts to date, accompanied by neglect of the realities which should shape our railroad policies in future.

The March 1965 analysis, findings, and order of the examiners, in those portions which are relevant to the foregoing discussions, reads like a fairy tale in view of what we now know. On pages 195-211 of their work, under the heading "External Economics Affecting Applicants . . .", the examiners for all practical purposes *embrace the notion that no substantial improvement in freight traffic carried by the two lines was in prospect for the period through 1970 as a whole.* On page 202, they cite without challenge the views of the applicants that an estimate of the number of ton-miles they might be expected to handle by 1970 should properly be derived from trend projections based on data for the years 1950 and 1960, ignoring the abysmally low economic growth rate during most of 1953-1960 and the general economic recession commencing in 1960. On page 203, the examiners say that they are puzzled by certain aspects of my projections offered on behalf of R.L.E.A.—projections which thus far have turned out to be essentially correct with respect to ton-miles of traffic. On page 206, the examiners base their own conclusions on the assumption that trend lines during the period 1947-1963 will continue, and thus reach what we now know to be these amazingly wrong conclusions:

> "Rail output will continue to fluctuate around the 600 billion ton-miles mark with approximately upper and lower limits of 650-660 and 550-560.
>
> "Eastern District roads and the N.Y.C.-P.R.R. specifically will face a *continued decline in output* (italics mine)."

On page 207, the examiners state:

> "It is not prudent, in our opinion to predict either sharply increased long-term rates of growth for the economy or for rail output. The best that can be said is that higher rates of growth will occur, as in the past, during the expansion phase of the business cycle; that

> such rates will be counter-balanced by very low or negative growth rates in the contraction phase of the cycle; and that rail output will follow the cyclical pattern established in the past . . . We can see in the record no reason for optimism on applicants' traffic level."

On page 211, the examiners state:

> "It must be concluded that to 1970, it is highly probable that rail carriers in the East, and particularly applicants, at best will maintain their present volumes of ton-miles (trend projection based on 1958-1963 experience) and more than likely will continue to experience a general decline of freight traffic handled at least in terms of ton-miles (trend projection based on 1947-1963 data)."

The table on the top of page 205 of the examiners analysis, findings, and order brings into high relief the extraordinary extent of the error upon which their entire position pivots. This Table shows that the examiners projected 600 billion ton-miles for U. S. railroads as of *1970*; actually the figure was 659.3 ton-miles in *1964*, with considerably higher prospects for *1965*. My high projection was 690 billion ton-miles for 1965, which would appear as of now to be very close to the mark. The examiners projected 64 billion ton-miles to be carried by Penn-Central in *1970*; the actual carried by these two roads, as I have already stated, was 83.6 billion in *1964* and an annual rate of 88.8 billion (practically the same as my 89 billion projection) during the first half of *1965*. My high projection for 1970 for U. S. railroads was 810 billion ton-miles, and for the two roads 105 billion, both of which seem conservative viewing developments thus far, and my low projections were 585 billion and 77 billion, respectively. It is also of significance to note that this table on the top of page 205 of the examiners' work completely misinterprets and therefore inadvertently misrepresents the studies which I placed before them, and which subsequent developments show they would have benefited by using more carefully. In this Table, the examiners designate as *"realistic"* the lower of my two projections for 1970 with respect both to U. S. railroads and Penn-Central. Far from designating these projections as "realistic," I designated them throughout as "low," stated that they were based upon continuation to 1970 of the abysmally low economic growth rate 1953-1960 (or 1953-1962), and insisted most vigorously that it would be absolutely unrealistic and wrong to base the outlook for the two roads upon any assumption that this abysmally low economic performance would continue. In fact, this adverse trend has been profoundly reversed from 1961 forward to date, and the outlook now, by general consensus among the informed, is even brighter than it was in early 1963 when I testified before the examiners.

What more need be said to prove how utterly wrong the examiners' assumptions have turned out to be through 1965? Taking into account what has happened from 1961 or 1963 through 1965, the economy in general and the railroads in particular would need in future to be hit by a veritable catastrophe of substantial duration in order to make the record 1965-1970 sufficiently bad to give any semblance of reality to the examiners' projections from 1961 or 1963 through 1970. And what would happen to us all, if our national economic policies or the policies of our great private businesses were predicated upon planning for the advent of such disaster, instead of planning for their contributory participation in growth and progress?

On pages 229-286, the examiners attempt to dispose of the claims that the proposed merger would impact with excessive severity upon specific areas, States, and communities. But in order to analyze this problem effectively, one must first make some assumption as to how much traffic the two rails will be called upon to carry before appraising whether the facilities and services contemplated by the proposed merger will be so insufficient as to impose great hurt anywhere. And when the examiners have gone so wrong in their estimates of the traffic outlook, they leave themselves in no position to make the second appraisal. If one misjudges the overall situation enormously, one cannot hope to be correct with respect to the subdivisions or details. In short, the examiners were not worried about the rail needs of these areas because they expected them all to run down hill.

II. THE FINANCIAL ASSUMPTIONS UNDERLYING THE MERGER PROPOSAL HAVE ALREADY BEEN PROVED EGREGIOUSLY WRONG.

We come next to the issue of the financial condition of the two roads, past, current, and prospective. It is a matter of common knowledge that the rapid movement toward the initiation and approval of railroad mergers in recent years, and notably so in this instance, have been based upon the view that the rails were in serious or desperate financial difficulties, and that merger was the one way, or the best way, to overcome these difficulties. A fair reading of the examiners' product in this case supports the conclusion that this was regarded by the examiners as the compelling factor in their approval of the proposed merger. But two essential considerations have been omitted from this prevalent approach. First, there is nothing to justify the proposition that the financial condition of any roads seeking merger should be elevated above other considerations. The foremost question to be considered in connection with any proposed rail merger is whether the national interest will be served in terms of adequate facilities and services. This much our economy, our nation, and our people require, regardless of the financial condition of the applicant railroads. If in fact it were to be demonstrated that the financial situation of any major railroads was as serious as they might claim, then ways must be found to relieve and improve their financial condition along lines which do not sacrifice adequate facilities and services as the supreme criterion of the national interest. This is the very meaning of the public interest or public utilities concept; it is the very reason for the existence of this Commission. Open subsidization of our railroads by our Government is not desirable, other things being equal; and public operation or management of the railroads is not a consummation devoutly to be wished. But if these were the only alternatives to a gravely deficient railroad service, necessity would have to take precedence over our wishes or our ideologies. Second, the examiners failed to consider at all the alternative available methods by which the financial condition of these two roads might be improved, even if this condition were as grave as alleged.

But this proposed merger has not in reality confronted us, and does not now confront us, with the foregoing choices as the major elements in the problem. My testimony in 1963 before the examiner offered abundant evidence, substantiated from many other reliable quarters, that the two roads under consideration were not distinguishing between financial difficulties and financial disaster. They were not taking into account the impact upon their finances of economic conditions which were neither usual nor tolerable, and which in fact have not endured. Subsidiary to this but important nonetheless, my 1963 testimony indicated that the analysis of their financial condition presented by the two roads ignored such important factors as their cash flow—a factor weighed heavily by objective economists and financial people. I also pointed out in 1963, not only that the economic outlook called for far less pessimistic evaluation of the financial outlook for these two roads, but also that the Government was even then taking many steps to help them—vast tax reductions, amortization allowances, and a number of other measures. I pointed out that these two roads in particular were not exploring their own capabilities for self-help, through changes in their rate-making policies, more vigorous competition based upon improved facilities, etc. And I pointed out that the course of future actions upon which the merger proposal was founded, restrictive and noncompetitive in nature, would multiply and intensify rather than reduce or alleviate the financial difficulties in which the two railroads found themselves.

Some of this testimony of mine in 1963 may then have been regarded by some as highly speculative, hypothetical, or unduly optimistic. But we are now in 1965, and the record in support of my analysis and forecasts is clear and compelling. The primary aspects of this record are set forth on my *Charts 11, 12, and 13.* Without going into the details of these three Charts, in view of the shortage of time, but submitting them for examination by this Commission, I would here call attention only to the main facts set forth on *Chart 13:* Comparing annual rates during the first half of 1965 with 1961, the following results appear: For Penn and Central combined, total railway operating revenues have risen from 1,432 million dollars to 1,545 million or almost 8 percent; net railway operating income has risen from 17.3 million to about 98 million seasonally adjusted, or more than 5½ times; net income has risen from a deficit of 9 million to a seasonally adjusted annual rate of 66 million; and cash flow has risen from 85.9 million to 148.0 million, or more than 72 percent. The Chart also indicates the changes from 1963 to first-half 1965 annual rate; for example, net income has risen from 16.2 million dollars to about 66 million seasonally adjusted, or multiplied more than 4 times; cash flow has risen from 107.1 million to 148.0 million, or more than 38 percent. To argue that this is a temporary or cyclical trend, which will be reversed if the economy should move into another long period of stagnation and recession, would be tantamount to arguing that our national transportation policies should be geared to what should be avoided rather than to what should be achieved.

My *Chart 14* affords another example of why the earlier emphasis upon the financial plight of the two roads was grossly exaggerated, and also indicates large improvement in the most recent years. In my 1963 testimony, I pointed out that, comparing 1961 with 1952, the long-term debt of the two roads in ratio to stockholders' equity was reduced from 73.4 percent to 57.3 percent; long-term debt in ratio to total assets was reduced from 37 percent to 31.9 percent; and shareholders' equity in ratio to total assets was increased from 50.4 percent to 55.7 percent. By 1964, reflecting real improvement, the first ratio was reduced further to 50.9 percent; the second ratio was reduced further to 29.1 percent; and the third ratio was increased further to 57.1 percent. The sustained improvement in all three of these ratios is far more important than the very nominal downward trend in the total assets of the two roads as conventionally measured, especially when consideration is given to the large reductions in their long-term debts.

Another accepted test of financial condition on the railroads is to be found in the operating ratios, or operating expenses expressed as a percent of operating revenues. As my *Chart 15* shows, in the case of Pennsylvania the operating ratio which had declined from 84.17 percent in 1952 to 82.81 percent in 1960 declined further to 79.89 percent in 1964. In the case of Central, the decline was from 84.51 percent to 84.15 percent and then to 81.70 percent. And for the two roads combined, the decline was from 84.32 percent to 83.40 percent, and then to 80.66 percent.

In my 1963 testimony, as shown by my *Chart 16*, I attempted to dispose of the argument for the merger based upon the prosposition that the two roads did not have adequate funds for their investment purposes and therefore could not make the outlays which would enable them to compete more efficiently with other modes of transportation and thereby improve their income position. I pointed out, as the Chart shows, that the maintenance of way and equipment expenditures of the two roads declined from 12.5 percent of their total assets in 1952 to 7.8 percent in 1961, and that their gross capital expenditures declined from 6.1 percent of their total assets to 2.2 percent over the same period of time. Both of these trends indicated strongly that a contractionist business philosophy, rather than financial limitations, was generating the unfortunate downward trend in these types of outlays. Be this as it may, and without benefit of the merger which the two roads claimed was essential to put them in a position to reverse their contractionist investment course, the year 1964 compared with 1961 showed maintenance of way and equipment expenditures rising from 7.8 percent to 8.04 percent of total assets, and gross capital expenditures rising from 2.2 percent to 4.05 percent of total assets. In absolute terms, the gross capital expenditures of the two roads rose from less than 93 million dollars in 1961 to 166 million in 1964. In 1963, I also emphasized the significance of the extraordinarily high ratio of the unappropriated retained income of the two roads to their appropriated retained income for all of the years from 1952 forward, and especially from 1958 forward, as shown on the same *Chart 16*. This in itself casts serious doubt upon the claim that the two roads were being prevented by their financial situation from making necessary investments. And carrying forward to 1964, the two roads showed total retained income of 1093.6 million dollars, unappropriated retained income of 1066.1 million, and appropriated retained income of only 27.5 million.

One of the most important arguments which I advanced for consideration in 1963 was this: although the two roads were claiming that their income difficulties in the preceding years were attributable primarily to rising costs, and that a solution depended upon the elimination of facilities, jobs, and services which would result from the proposed merger, the actual situation did not bear out this claim. On the contrary, even as of the time of my 1963 testimony, the data through 1961 showed clearly that the two roads had been doing well with respect to their average traffic-unit revenues, and that their financial difficulties were in consequence of the inadequate level of revenue traffic-units, due partly to the chronic economic stagnation and partly to the noncompetitive attitude of the two roads, their unwillingness to improve their facilities and services, and their consequent failure to attract their potential share of total traffic. In support of this thesis, as shown on my *Chart 17*, I pointed out that the average traffic-unit revenue of the two roads rose from 0.94 cents during the period 1941-1945 to 1.54 cents in 1961, an advance of 63.8 percent. But with revenue traffic-units declining 45.3 percent, net income for the two roads dropped from an average of 112.7 million dollars during 1941-1945 to a deficit of 9 million dollars in 1961. Thus, my conclusion was that only a more expansionary U. S. economy and the substitution of an expansionary for a contractionist policy by the two roads themselves could improve their earnings in the long run. The years from 1961 to 1965 have underscored the validity of this approach. With the greatly improved rate of economic growth during these most recent years, and with some substantial awakening on the part of the two roads themselves —without benefit of merger—to the need for a more active policy of investments and improvements geared to making them more competitive, the revenue traffic-units carried by the two roads rose (as shown on the Chart) from an index of 115 in 1961 (1939 equals 100) to 130 during the first half of 1965, and the net income position of the two roads improved from a deficit of 9 million dollars in 1961 to an annual positive rate of 55.2 million in the first half of 1965, even though average traffic-unit revenues declined substantially from 1.54 cents in 1961 to 1.43 cents in 1965.

Seasonal adjustment of the 1965 data would further strengthen my case. Further income improvements for these two roads depends not upon attempting to reduce their per-unit costs through abnegation of their service responsibilities, but rather along lines of the expansionary policy which the avowed objectives of the proposed merger reject.

Pursuing further the same line of analysis, my 1963 testimony urged that the examiners take into account the following factors which would and should conspire to improve immensely the financial condition of the two roads: the prospect of a higher and more sustained rate of U. S. economic growth; the potentials available to the two roads to enlarge their share of traffic through an activist improvement policy; the financial benefits which would flow to the two roads from the announcement on March 28, 1963, of the Interstate Commerce Commission's decision redistributing freight revenues among various railroads; the financial benefits which would flow to the two roads from the tax proposals before the Congress, which resulted in large corporate and personal income tax reductions in 1964—and we should also take account now of about 2 billion dollars worth of tax concessions granted by the Treasury in 1965 through revisions in amortization and depreciation schedules; the financial advantages which would flow to the two roads from the depreciation guidelines promulgated by the Internal Revenue Service in 1962 and the so-called 7 percent investment credit enacted by the Congress in 1962, the favorable impact of which was only beginning to be felt as to the railroads in early 1963; and the financial benefits which would flow to the two roads from the new "Work Rules" promulgations which were shortly to be issued. It would appear that the findings and order of the examiners in March 1965 took scant account if any of these various factors. Indeed, the examiners' discussion of the financial aspects of the case take practically no account of financial developments subsequent to 1963, and interpret the developments to 1963 in a pessimistic manner not borne out by subsequent developments.

On my *Charts 18 and 19*, as presented in early 1963, I compared the actual net operating railway income after taxes and the actual net income after taxes of the two roads during the period 1953-1961 with my own estimates of what these levels of income would have been under conditions of adequate economic growth, plus activist efforts on the part of the two roads to achieve their potential share of available traffic. To those who would say that my exercise was highly "speculative," I would answer that all such estimates as guides to policy have elements of speculation, and that my so-called "speculation" on this score stands all empirical tests very much better than the speculative projections relied upon so heavily by the two roads in support of the contractionist policies embedded in the proposed merger. To illustrate, my *Chart 18*, as presented in early 1963, contains my estimate that the single factor of an adequate rate of economic growth during the period 1953-1961 would have lifted the net operating income of the two roads to somewhere in the neighborhood of 85 billion dollars by 1961. The improved but not adequate rate of economic growth from 1961 forward has brought us not very far above where we would have been in 1961 if an adequate rate of growth had been maintained from 1953 forward, and during the first half of 1965 the net railway operating income of the two roads was running at an annual rate about 98 million dollars seasonally adjusted, or far above my estimate of about 85 million dollars for 1961. Looking now at my *Chart 19*, during the first half of 1965 the net income after taxes of the two roads was running at an annual rate of about 66 million dollars seasonally adjusted, or above my estimate of about 62 million dollars for 1961 if an adequate rate of economic growth had been maintained from 1953 forward. To be sure, the roads are not now enjoying levels of income as high as my earlier testimony projected for 1965, but this was in part because my projections were based upon the restoration of reasonably full resource use by 1965, which in fact we have not yet come near achieving, and in part because the two roads themselves have fallen far short of bringing to bear in their favor many of the factors which have been and still are available to them. Also, and not "speculatively" at all, the tremendous improvement in the incomes of the two roads since 1961 or 1963 stands in vivid contrast to the view firmly expressed by Dr. Williams on behalf of the applicants that in the absence of merger the incomes of the two roads would continue to move downward through 1970.

In support of my assertions that the two roads themselves accepted the projections made by Dr. Williams as fundamental support for the merger proposal, I called attention in my early 1963 testimony to the fact that Mr. Pearlman (then President of Central) on pages 1304-06 of the transcript virtually admitted that, even with the merger, the financial condition of the two roads would continue to get worse if President Kennedy's transportation program were not carried out, and that the merger would merely provide "breathing time." In response to this assertion by Mr. Pearlman, I stated in my 1963 testimony:

> "If the proposed merger, even in the judgment of its proponents, will merely provide 'breathing time,' a step so potentially injurious to the public interest on so many grounds should not be taken, until the remedies proposed by the President and other remedies are first applied, and given time to make themselves felt. Some policies can be altered if they are ineffectual, but a great corporate merger of the kind here proposed would be an irreversible step."

The time which has elapsed since I made this statement in early 1963 has already brought to light how erroneous and irreversible a step would have been taken if the merger had been finally consummated at that time on the basis of the financial data then available and some of the financial projections then made which have already turned out to be so grossly wrong.

The most important part of the analysis by the examiners is their "financial analysis" running from page 57 to page 88. This is made clear throughout, and especially by their statement on page 57, to which I earlier referred, that "our primary concern is the financial condition of the carriers." *I respectfully submit that actual developments to date have completely torpedoed the whole financial analysis made by the examiners as related to their conclusions and order, and therefore virtually have torpedoed their basic case in support of the merger.*

On page 211, after repeating their grievously erroneous conclusions that the rail carriage of the two roads in terms of ton-miles would most likely continue to decline through 1970, the examiners state this:

> "From this it may be inferred that their financial condition, barring substantial reductions in cost, will deteriorate further . . . past and present general economic data available do not support the view that applicants or other eastern railroads are in the process of rejuvenation, and that their output should increase significantly within the forseeable future."

The really bizarre nature of these conclusions by the examiners, in view of the trends through mid-1965 which I have already cited, speaks for itself.

For this reason, I do not need to go into detail with respect to some of the aberrations in logic running through the financial analysis by the examiners, their unwillingness to open their minds to points which I and others have made which have turned out to be correct, and their bearish insistence (at all stages of their analysis) upon proving to their own satisfaction that the two roads were moving toward financial disaster if not relieved by permission to merge.

And this being the case, there is no need for me to discuss in detail the treatment by the examiners on pages 131-155 of the estimated savings which the merger would bring to the two roads. I have at no times contested the validity of these estimates, although others have. Instead, I have urged this: The examiners, due to their erroneous appraisal of the traffic and income outlook, reach the conclusion that these savings would be a needed avenue to salvation. My conclusion in 1963, based upon my traffic and income projections which have turned out to be essentially correct, was that these savings were not essential to salvation, and beyond this that these savings would result from a future downward budgeting of facilities and services which would be highly injurious to the national interest and even to the two roads.

III. THE PROPOSED MERGER REPRESENTS AN INDEFENSIBLE CONCENTRATION OF ECONOMIC POWER

I have said at the outset here today that I am not opposed to mergers or "biggness" *per se*. But there is no presumption in their favor, even in the case of railroads; and all authoritative statements of national policy to date point in the opposite direction. To take just one example, when the White House released on March 6, 1963, the report of the Interagency Committee on Transport Mergers, the very first criterion set forth in this Report read as follows: "Will the proposed merger restrict effective competition in the provision of transportation services in the areas affected?"

There can hardly be doubt that the proposed merger would destroy very important intra-modal competition within the railroad industry. For in response to the question of whether Penn and Central were competing in 1963, Mr. Symes (then President of Penn) replied on Page 427 of the transcript: "Oh, yes, very much so." Assuredly, these two roads would not continue to compete if they were merged. However, the merger has been supported on the grounds that it would enable the two combined roads better to engage in inter-modal competition. But it is essential to recognize that the best way for the railroads to improve their inter-modal competition is by engaging in vigorous competition among themselves, including rate competition. And the just-mentioned comment by Mr. Symes appears to be in conflict with the testimony of Mr. Lecht to this effect: "Equally essential, the proposal to establish the Penn-New York Central Transportation Company is a step in the direction of attenuating inter-modal competition and not of increasing it."

Bearing upon the virtually unparalleled concentration of economic power which would be involved in the proposed merger, I would call attention first to my *Chart 20.* It indicates that, in 1961, Penn and Central viewed together accounted for in the neighborhood of one-third of all Eastern District road operated, freight traffic, freight-train cars operated, and current assets; in the neighborhood of 40 percent of all locomotives in service, total employment, and total railway operating revenues; more than 43 percent of all passenger traffic; and more than 53 percent of all passenger-train cars in service. And looking at the situation community by community, an article in The Wall Street Journal on July 18, 1962, pointed out that, in consequence of the proposed merger, there would be lessened or no competition in the 150 common points now served by both railroads. On pages 1409 and 429 of the transcript, Mr. Pearlman and Mr. Symes, respectively, testified to the effect that no serious study had been made of the effects of the proposed combine upon competition or upon the share of the two roads in total traffic in terms of specific localities. The failure by anyone to examine this issue in sufficient depth—I have not had the resources to do so—is one of the yawning gaps in the analysis brought forth in support of the proposed merger.

My *Charts 21 and 22* shed much further light upon the unparalleled economic dominance which this merger would entail. These Charts reveal, as of 1961, the sales and assets of leading companies (gross operating revenues take the place of sales in the case of railroads) measured as a percentage of the industry total. Since Penn and Central are concentrated in the Eastern District, even though their activities have nationwide ramifications, the most relevant comparisons are those between the shares of these two roads in the Eastern District totals with the shares of truly nationwide companies in the nationwide industry totals for their lines of activity. Compared with the 38.8 percent ratio to total sales and the 34.9 percent ratio to total assets represented by Penn and Central combined, the ratios of other leaders in their respective fields in 1961 were as follows: Standard Oil of New Jersey, 28.7 percent and 25.7 percent; General Electric, 15.0 percent and 14.1 percent; DuPont, 8 percent and 13.1 percent; International Harvester, 6.3 percent and 7.0 percent; United States Steel, 18.8 percent and 26.6 percent; Aluminum Company of America, 9.3 percent and 13.5 percent; Goodyear Tire and Rubber, 17.3 percent and 19.9 percent; Metropolitan Life Insurance Company, 18.8 percent and 16.9 percent; and Bank of America, 11.7 percent and 11.5 percent. A. T. and T. showed 39.6 percent and 35.5 percent. General Motors showed 42.2 percent and 46.3 percent, which many regard as too high, even though G.M. in no sense dominates the motor industry in the manner that a Penn-Central combine would dominate the Eastern District.

My *Chart 23* portrays the gathering of power already achieved over the years by Penn and Central through the merger process and other acquisitions. And it naturally raises this pertinent question: If these two roads operating separately, through these mergers and acquisitions already consummated, have not according to their own allegations been able to solve even tolerably their financial and managerial problems, how in all common sense will doing more of the same thing enable them to do better? If getting big for so long has not helped Penn and Central, how will getting still bigger help?

(I have not been allotted the time here to indicate the degree to which my studies of the Penn-Central problem have been fortified by my examination of the nationwide railroad and overall transportation situation, which reinforces mightily all of the conclusions which I have reached. Merely to indicate to the Commission the scope of this examination, I call attention to *Charts 24, 25, 26, 27, 28, 29, and 30,* transmitted herewith. The significance of these charts was developed fully during the course of my testimony in early 1963.)

The discussion by the examiners of "Competition between Railroads" on pages 160-179 need not be discussed here in detail, because it can really be set aside on grounds which I shall subsequently state. But it should be noted that on pages 178 and 179 the examiners conclude that the possibility of total effective competition between the two roads exists at approximately 100 points or roughly 10 percent of the total number of points served by both; that about 15.2 percent of the total number of carloads of freight handled by the two roads in 1963 was highly competitive; that approximately 27 percent of their total traffic moved under a high degree of monopoly; and that, as the remaining 58 percent, the existence of competition was governed by "numerous variables" (some of these variables, I submit, could be modified so as to increase the effective competition between the two roads). These admissions by the examiners certainly make it clear that there has been and is now a large amount of competition between the two roads.

The discussion by the examiners of "Intermodal Competition" on pages 179-195 may also be set aside on grounds which I shall subsequently state. But it should be pointed out that the examiners on page 181 stated that "a precise analysis of intermodal competition and its effects as specifically related to applicants is not attainable." This statement would not seem to square fully with the tendency of the examiners to insist that an important point in favor of the merger is that it would enlarge the capabilities of the two roads to engage in intermodal competition. On page 191, the examiners appear to admit that equalization of Government aid to railroads with aid to other carriers would do more than all else to enlarge the capabilities of the railroads to engage in intermodal competition. With this I agree fully. But the whole effort of the examiners fails seriously to appraise the significance of these types of Government aid to the railroads as a preferable alternative to the proposed merger.

The reasons why I have made the comment that the foregoing aspects of the examiners' treatment of the competition problem should be set aside is to be found in a careful reading of the examiners' treatment of "The Cost to Competition" on pages 419-439. On these pages, the examiners virtually admit that the merger would lessen competition, that such lessening would be in conflict with national policy and undesirable if considered alone, but that this negative factor bearing upon the merger must be *balanced* against the positive factors. No one can quarrel with this general proposition. But what are the positive factors upon which the examiners rely for the purpose of overriding the negative factor of a lessening of competition? The two positive factors of significance are the examiners' conclusions that, without the merger, the two railroads would suffer through 1970 a continuing decline in their (1) traffic and (2) revenues. But since the examiners were in error on these two points to the extreme extent indicated above, the whole basis on which they waive aside the important value of maintaining and promoting competition (a value still manifest in our national transportation legislation, our antitrust and antimonopoly legislation, and other relevant declarations of national policy) vanishes into thin air.

IV. THE PROPOSED MERGER VIOLATES EVERY CRITERION OF ESTABLISHED NATIONAL POLICY.

Without attempting a thorough review of the legislation and Presidential documents which embody our national transportation policies to date, I call the attention of this Commission again to the Report of the Interagency Committee on Transport Mergers, issued on March 6, 1963. This Interagency Committee was of high significance, not only because of the caliber of its membership and the offices which they then held, but also because it evidenced recognition that the evolution of our national transportation problems must be set in the context of the throbbing problems of the U. S. economy as a whole, and that the treatment of the railroad industry must be set in the context of our transportation resources as a whole. Also, particularly in that the Anti-Trust Division of the Department of Justice was represented on this Committee, it must be assumed that all relevant legislation was entered into the criteria developed by the Committee. I therefore set forth below, for it may serve as a general summation of what I have said, some of the merger criteria set forth by the Interagency Committee, followed by my own brief comments.

> "(1) Will the proposed merger restrict effective competition in the provision of transportation services in the areas affected? . . . (5) Will the proposed merger, with the increased market power of the merged car-

> rier, have substantial undesirable repercussions on other carriers in the industry?"

On the basis of the whole record to date, the answer to question (1) is a resounding "yes," and the answer to question (5) is also a resounding "yes." This scores against approval of the merger.

> "(4) Will the cost and quality benefits resulting from the merger be reflected in benefits to the public? . . . (6) Will the proposed merger serve the long-run interests of both the public and the carriers concerned, or is it merely an attempt to meet a short-run crisis arising either because of unfavorable economic conditions in general or a particular transitory problem?"

I submit the answer to question (4) and the first part of question (6) viewed together as they must be is a resounding "no," and that the answer to the second part of this question (6) is obviously "yes."

> "(3) Can the economies sought by the proposed merger be achieved by alternatives more easily revokable which promise to be of comparable effect in accomplishing the improvement in over-all efficiency?"

I submit that the answer to this question (3) is that these alternatives have hardly been explored by those approving or advocating the merger, and that the so-called "economics" claimed for the merger would really be false economy in terms of our transportation requirements and the national interest.

> "(7) Is the merger proposed, in part, because of the imminent failure of one or more of the merging carriers, and is it the most appropriate solution to this difficulty?"

The merger was proposed and supported on the basis of allegations of bankruptcy just around the corner, but these allegations find no support in developments to date. And I submit, for reasons already stated, that the merger and the philosophy which it represents would injure rather than help the financial situation on the two roads. I submit, further, that this should not be the ultimate test of any such merger proposal.

> "(2) Will the proposed merger permit an economically more efficient use of resources, through full utilization, over a period of time, of plant and equipment and/or reduction in direct costs of unit per output, which will reduce costs while maintaining or improving the general quality of service offered to users?"

My answer is that the reduction in direct costs per unit of output, especially when sought through reduction of services and facilities, is not the road to economy or progress for these two railroads; and that the criterion of maintaining or improving the quality of service offered to users—which in this instance, must necessarily include quantity of service—would be violated by the proposed merger.

Reluctantly, I must point out also what must already be known to this Commission—that the analysis and conclusions of the examiners did not view this great national problem of the proposed merger in terms of these broad and essential criteria to anything coming within hailing distance of an adequate degree. Regretfully, and in sorrow not in anger, I must point out that the examiners rejected virtually *in toto* the studies which I brought before them—studies based upon a meticulous examination of every important aspect of the situation on the two applicant roads. The examiners paid no heed to the body of my materials which developed the need to set this Penn-Central matter in the context of the performance and needs of the U.S. economy as a whole. Instead of accepting estimates of the railroad facilities and services required in a fast-growing economy moving in response to the demands imposed upon it by the aspirations of a Great Society, the examiners estimated our railroad requirements on the basis of the years representing the most stagnant economic performance during this century, save only the years of the Great Depression. The examiners treated in a cavalier manner my projections of economic developments in general and on these two roads—projections which have turned out to be remarkably accurate—and the examiners might have been warned against this cavalier treatment by the common knowledge of my previous work in this field, and the general acknowledgment of its technical competence and usual accuracy. Instead, the examiners appear to have accepted almost lock, stock, and barrel the analysis and projections of the applicant roads themselves, all of which pointed in directions diametrically opposite to what has actually occurred since 1961 and especially since 1963. Regretfully, I must add that the work of the examiners, viewed as a whole, is a long and technical restatement of the position taken by the applicant carriers, capped with an unwarranted approval of their merger request. Some of this may be understandable, in view of the nationwide propaganda which has surrounded this whole vital issue for so many years—propaganda to the effect that these two railroads, and the railroads in general, were on the brink of a precipice, and that only the granting to them of a degree of concentrated economic power inconsistent with our cherished traditions and experience could save them. But the time has come, at long last, for fact to prevail over propaganda.

I am confident that this Commission will take the opposite course, and that in doing so the Commission will move to the conclusion that the merger of the Pennsylvania and New York Central Railroads should be disapproved in the national interest, and with benefit to these two roads themselves.

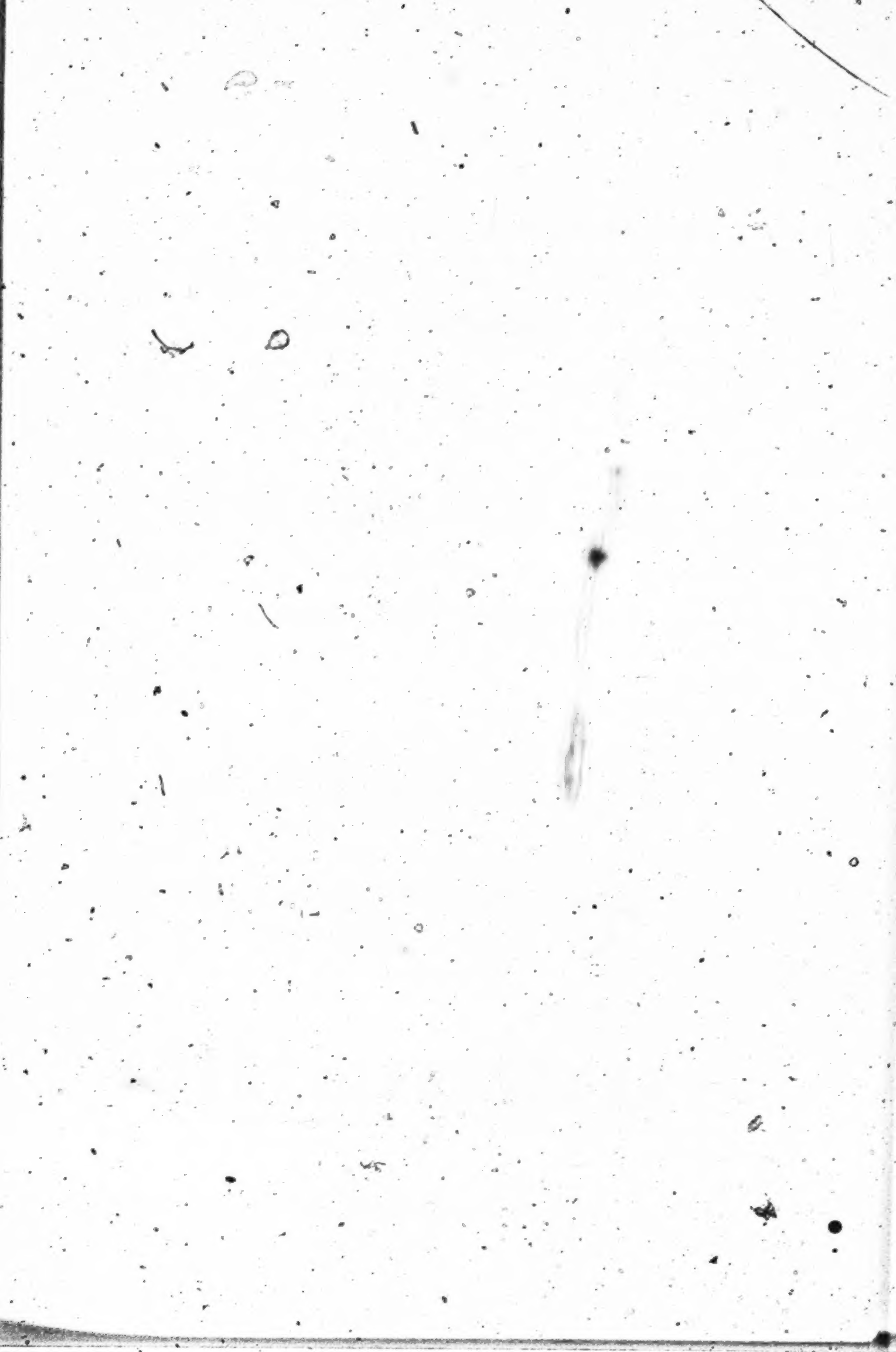
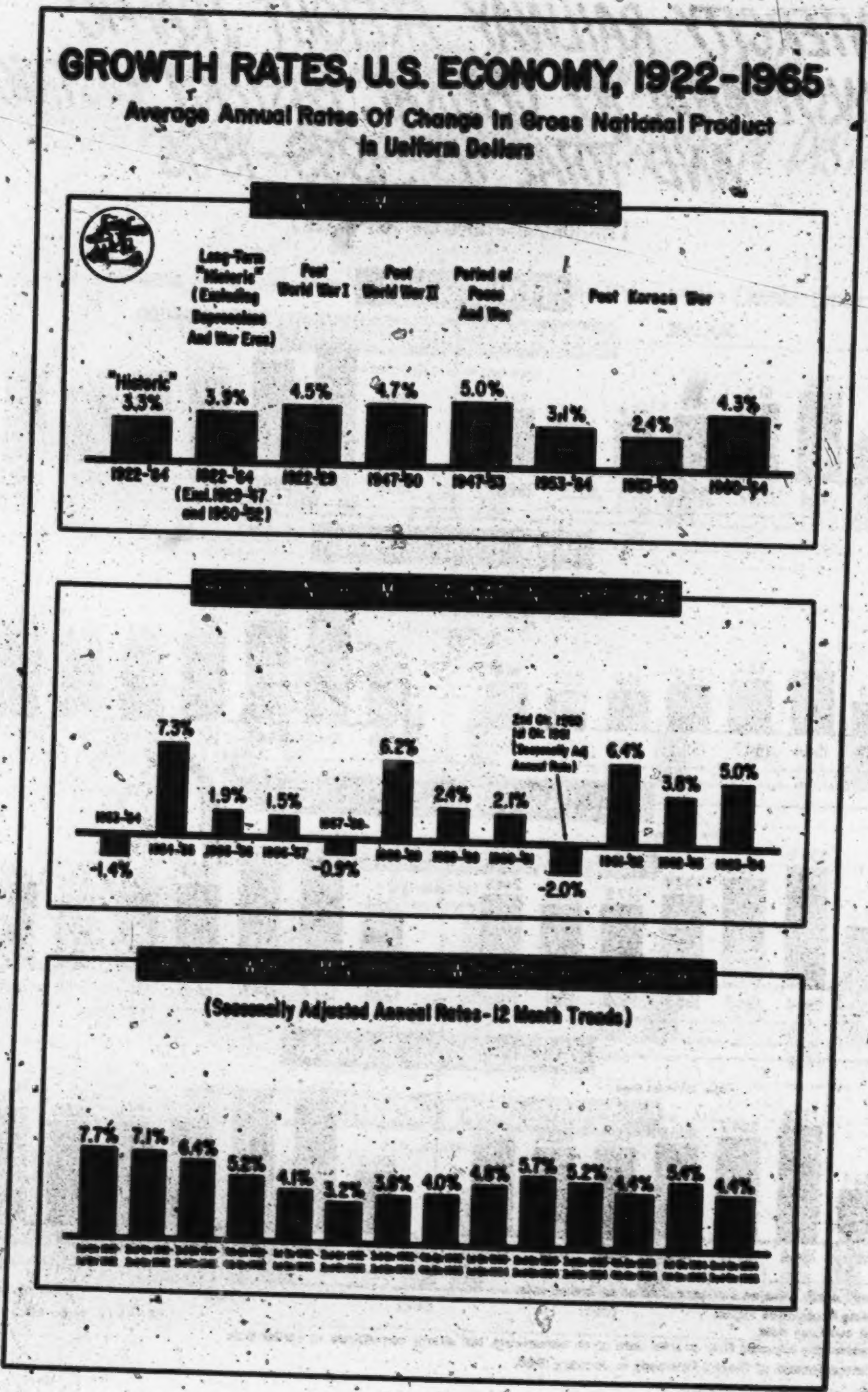


CHART I



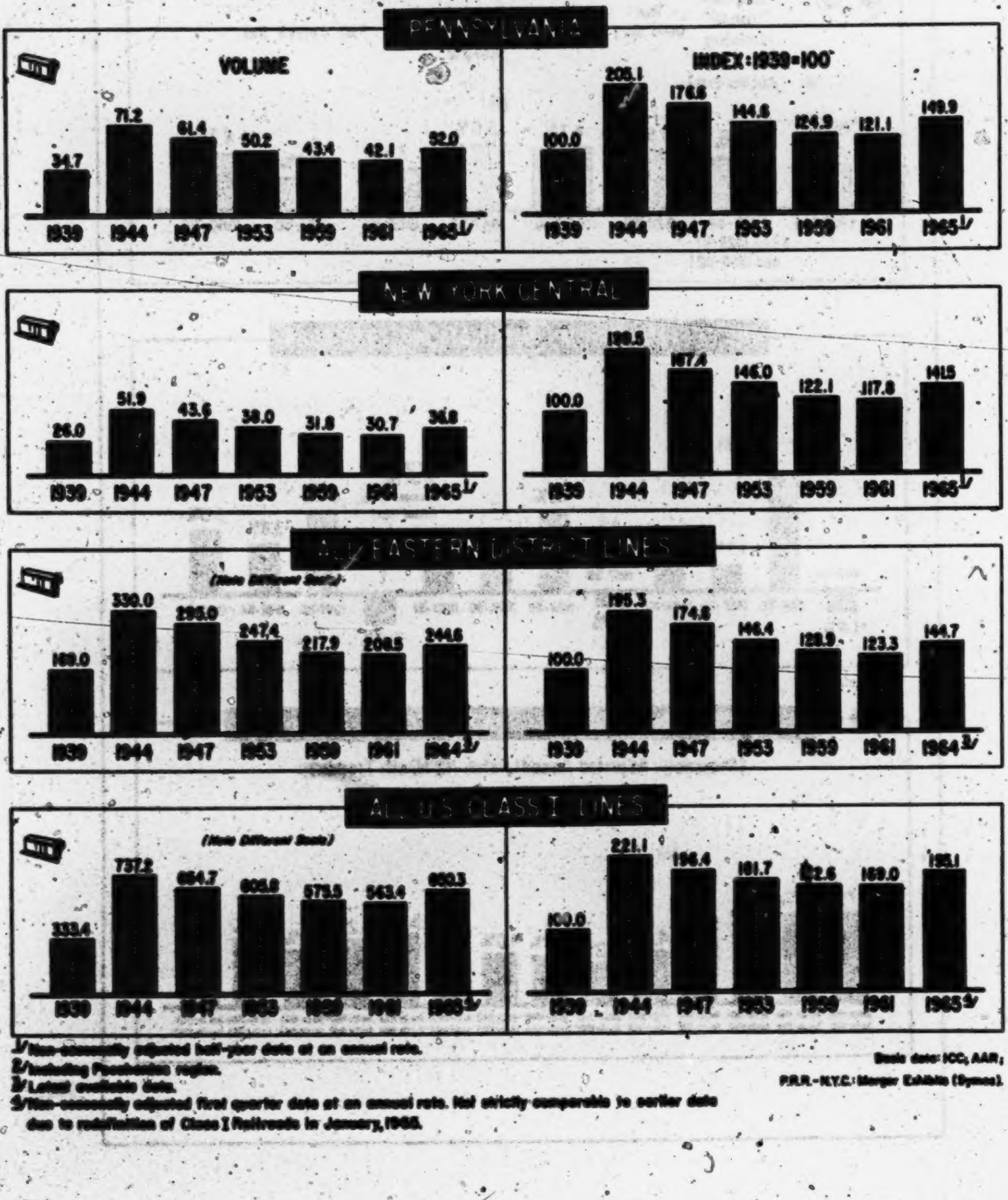
GROWTH RATES, U.S. ECONOMY, 1922-1965

Average Annual Rates Of Change In Gross National Product in Uniform Dollars

CHART 2

INTERCITY RAILWAY FREIGHT TRAFFIC PENNSYLVANIA, N.Y. CENTRAL, EASTERN DISTRICT AND TOTAL U.S., 1939-1965

(Billions of Revenue Ton-Miles)

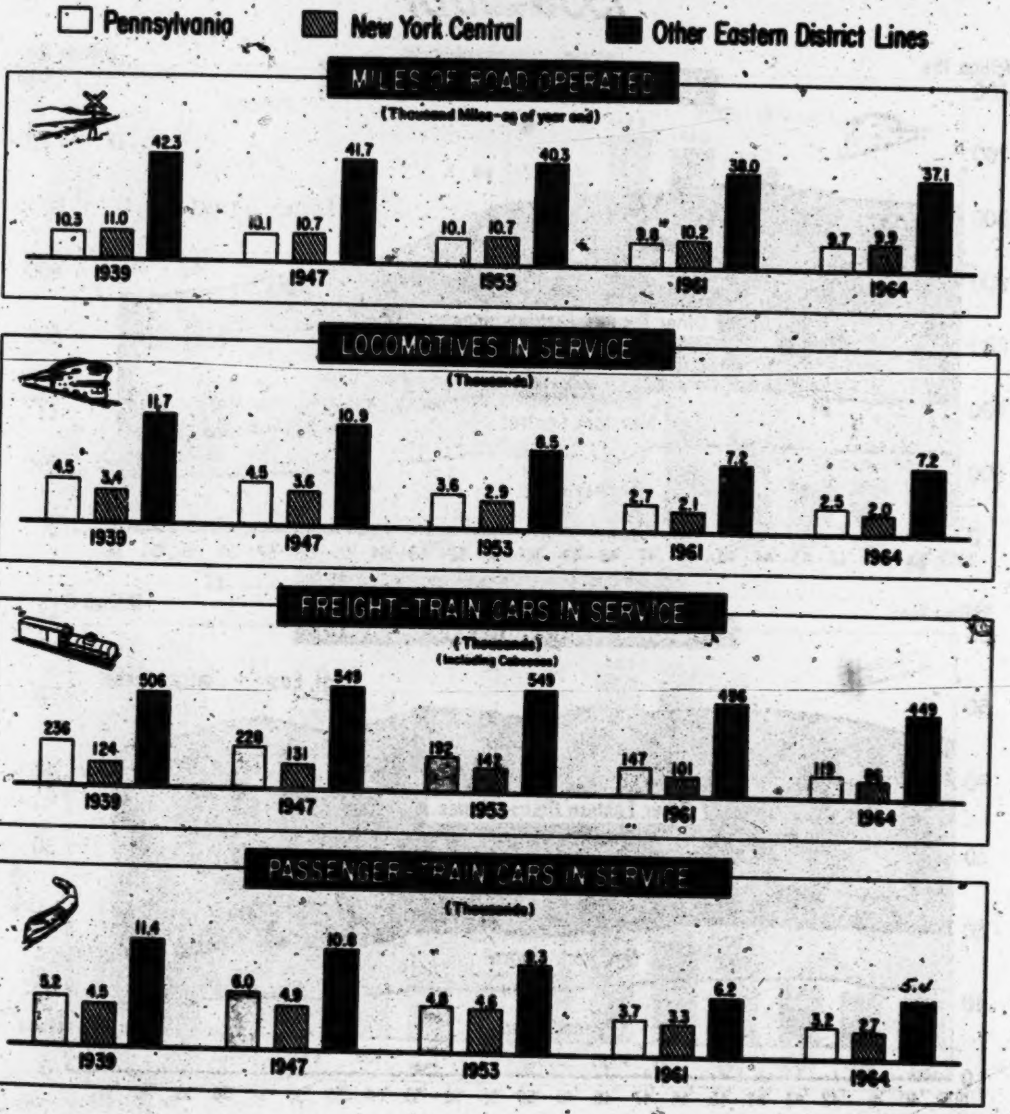


1/ Non-seasonally adjusted half-year data at an annual rate.
2/ Including Pocahontas region.
3/ Latest available data.
4/ Non-seasonally adjusted first quarter data at an annual rate. Not strictly comparable to earlier data due to redefinition of Class I Railroads in January, 1965.

Basic data: ICC, AAR;
P.R.R.-N.Y.C. Merger Exhibits (Symes).

CHART 3

ROADS, LOCOMOTIVES, AND CARS PENNSYLVANIA, N.Y. CENTRAL, & EASTERN DISTRICT 1939 - 1964



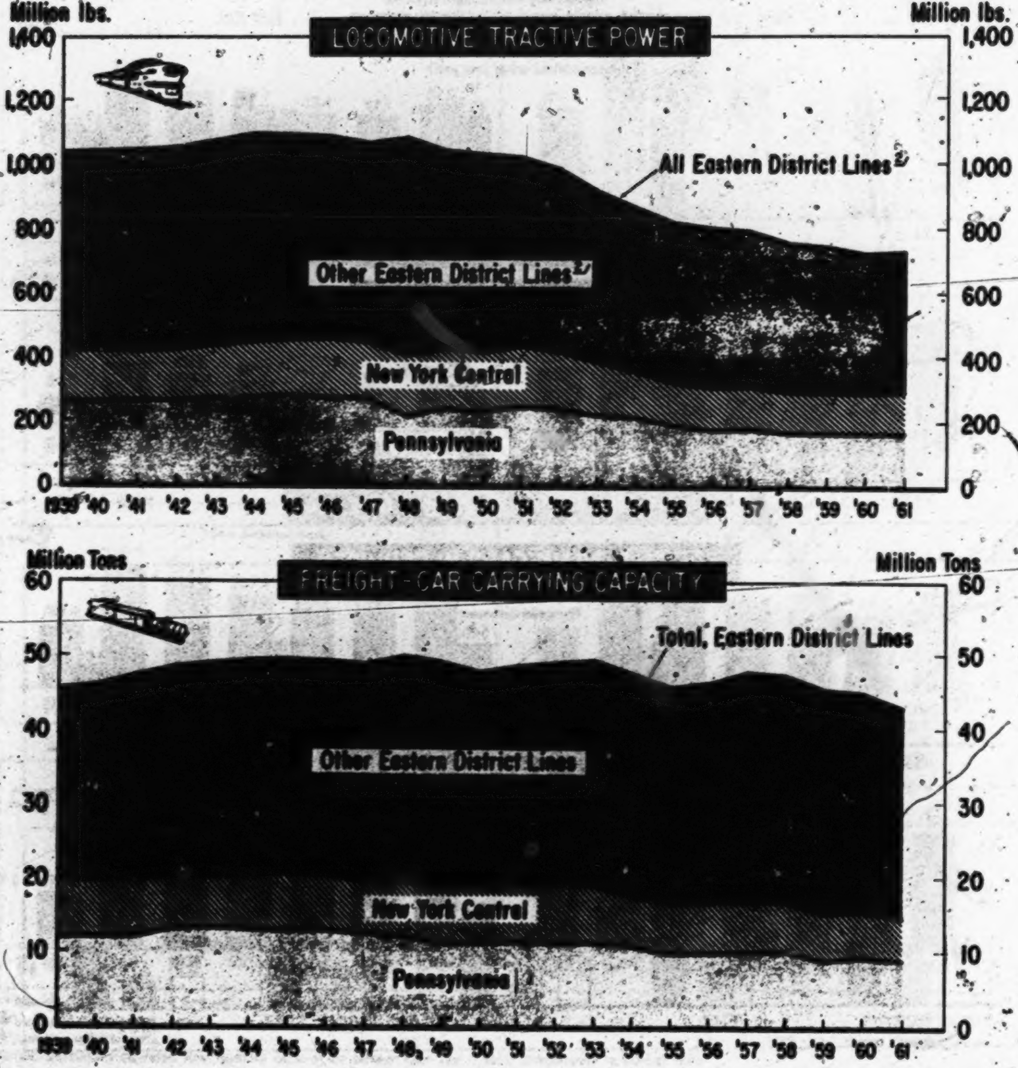
1/ Number in service at end of year.

Basic data: ICC, AAR,
P.R.R.-N.Y.C.: Merger Exhibits (Synop)

CHART 4

LOCOMOTIVE & FREIGHT-CAR CARRYING CAPACITY PENNSYLVANIA, N.Y. CENTRAL, & EASTERN DISTRICT[1]

1939 - 1961



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[1] Including Pocahontas Region.

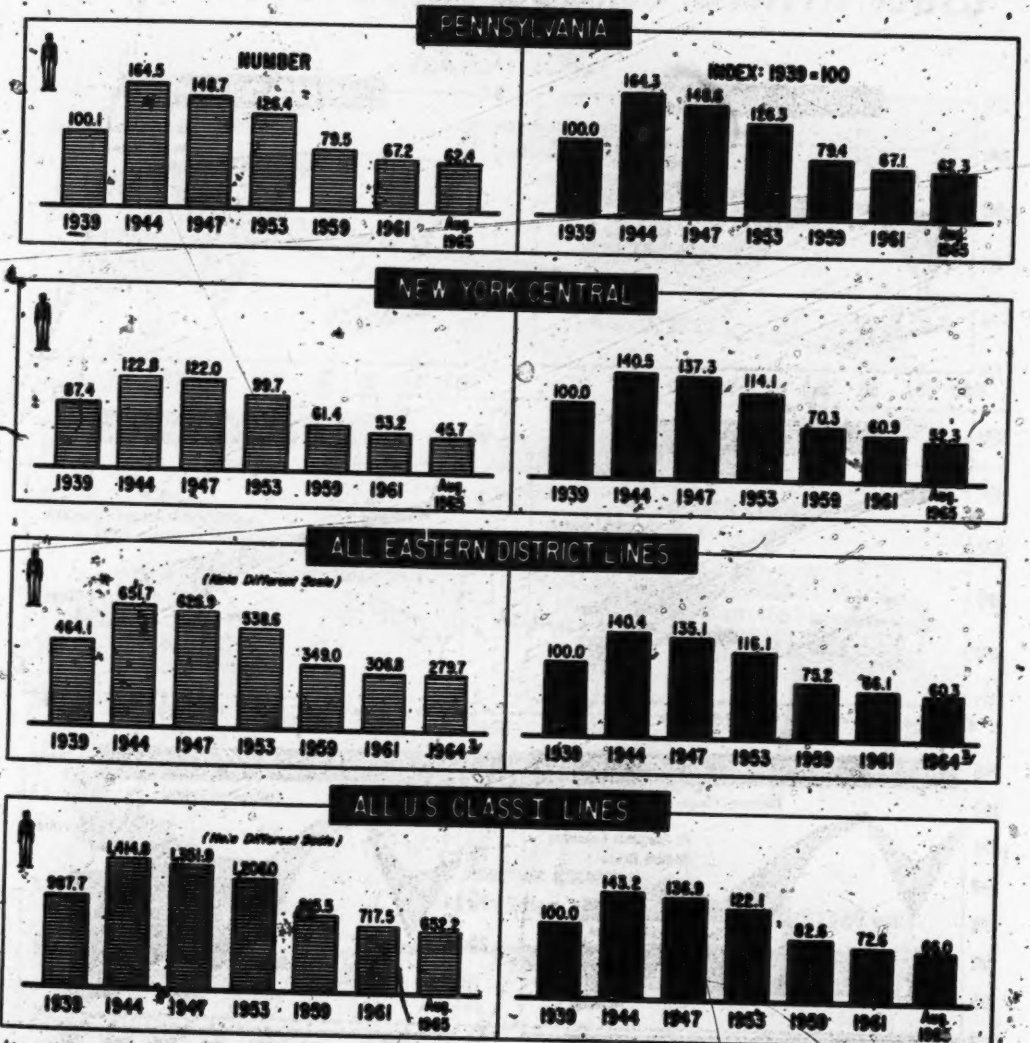
[2] 1939 and 1940 partly estimated.

Basic data: ICC; Moody's Transpt Manual.
P.R.R.-N.Y.C.: Merger Exhibits (Symes)

CHART 5

RAILROAD EMPLOYMENT TRENDS PENNSYLVANIA, N.Y. CENTRAL, EASTERN DISTRICT1/ AND TOTAL U.S., 1939-1965

(Thousands)



1/ Including Pocahontas Region.

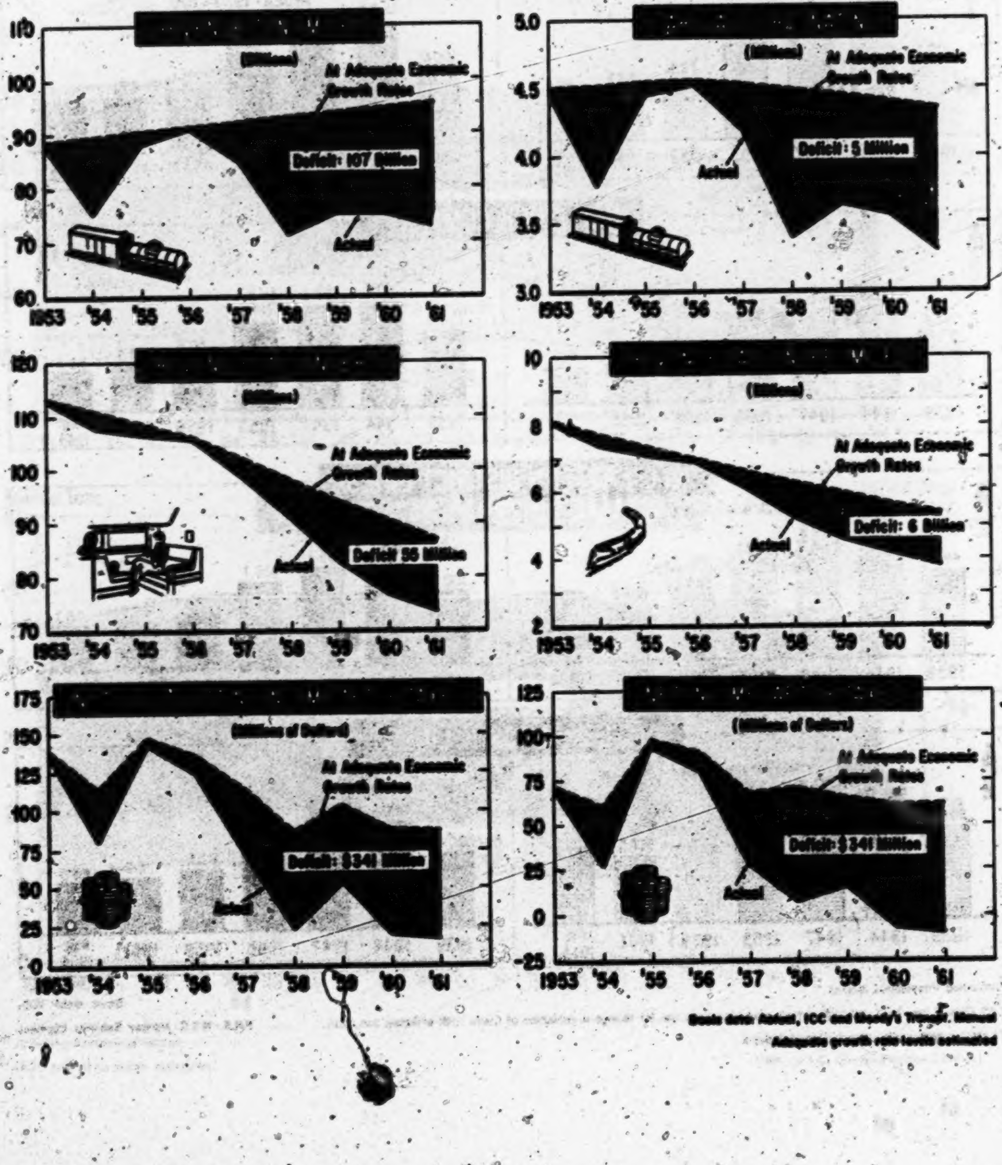
2/ All Class I line-haul railroads, not adjusted seasonally nor for change in definition of Class I-RR effective Jan. 1965.

3/ Latest available data, on a comparable basis.

Basic data: ICC; P.R.R.-N.Y.C.: Merger Exhibits (Symes)

CHART 6

TRAFFIC & INCOME—PENNSYLVANIA & N.Y. CENTRAL ACTUAL COMPARED WITH ESTIMATED LEVELS AT ADEQUATE OVERALL ECONOMIC GROWTH RATES 1953-1961

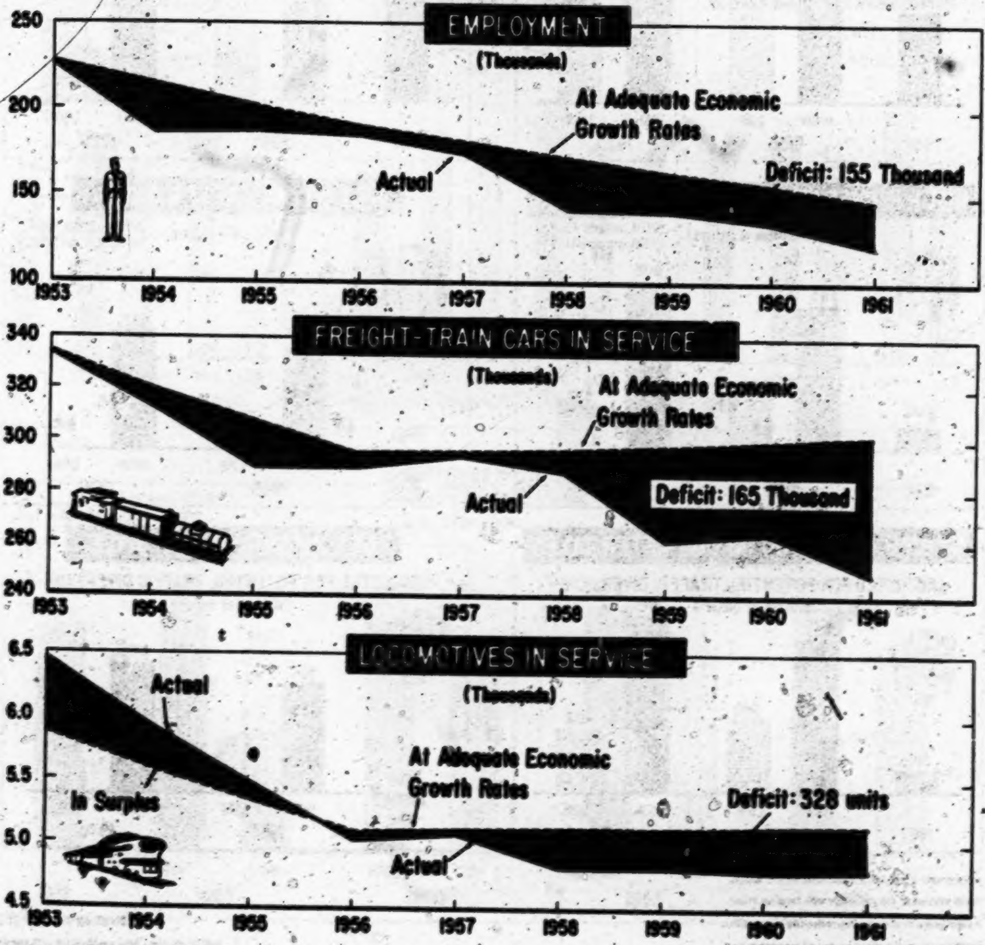


Basic data: Actual, ICC and Moody's Transport Manual

Adequate growth rate levels estimated

CHART 7

EMPLOYMENT, FREIGHT CARS, AND LOCOMOTIVES PENNSYLVANIA AND N.Y. CENTRAL ACTUAL COMPARED WITH ESTIMATED LEVELS AT ADEQUATE OVERALL ECONOMIC GROWTH RATES 1953-1961

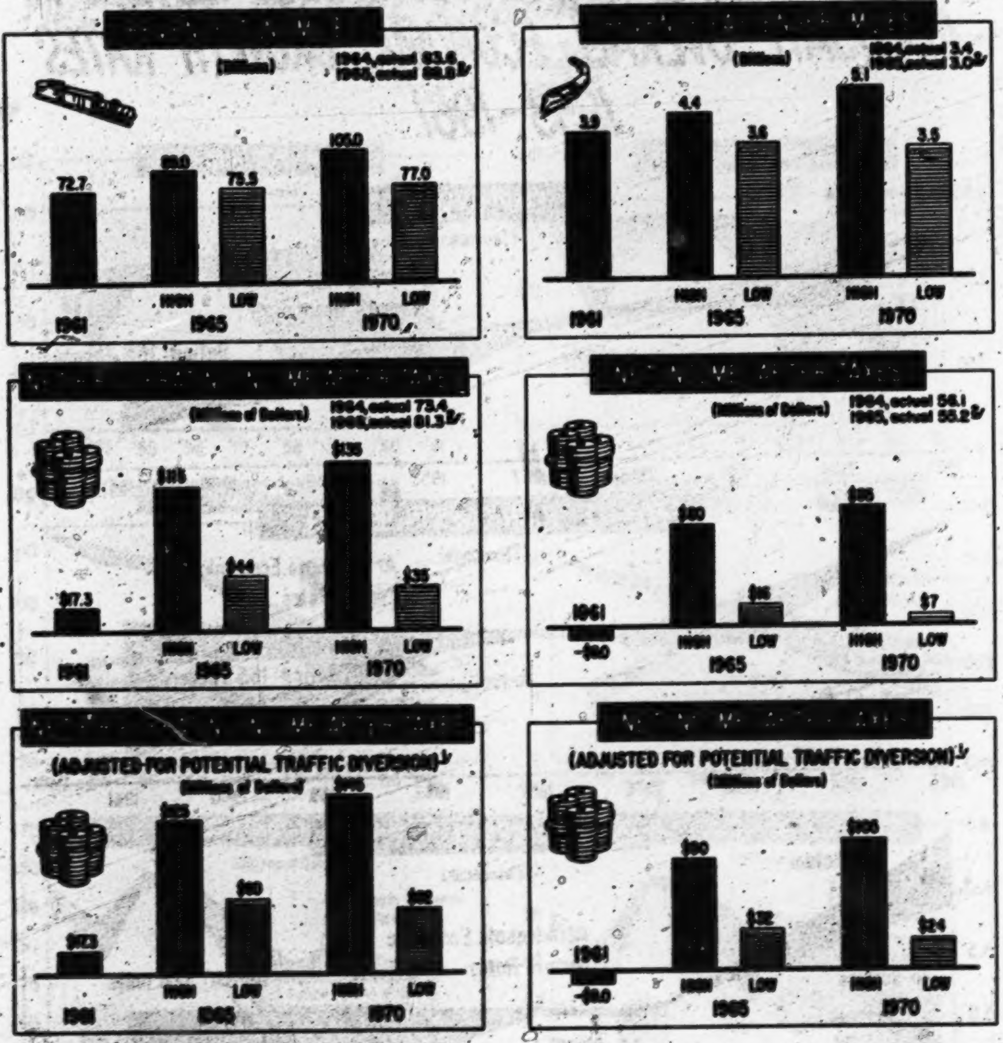


1/ Number in service at end of year.

Basic data Actual, ICC and Moody's Transp. Manual
Adequate growth rate levels estimated.

CHART 8

TRAFFIC & INCOME, 1961, & PROJECTED, 1965 & 1970 AT HIGH & LOW OVERALL ECONOMIC GROWTH RATES PENNSYLVANIA AND N.Y. CENTRAL



[1] Estimate of potential additional traffic which could migrate to the railroads with feasibly lower freight rates to improve the railroads' competitive position vis-a-vis other modes of transportation.

[2] First seasonally adjusted half-year data, at an annual rate.

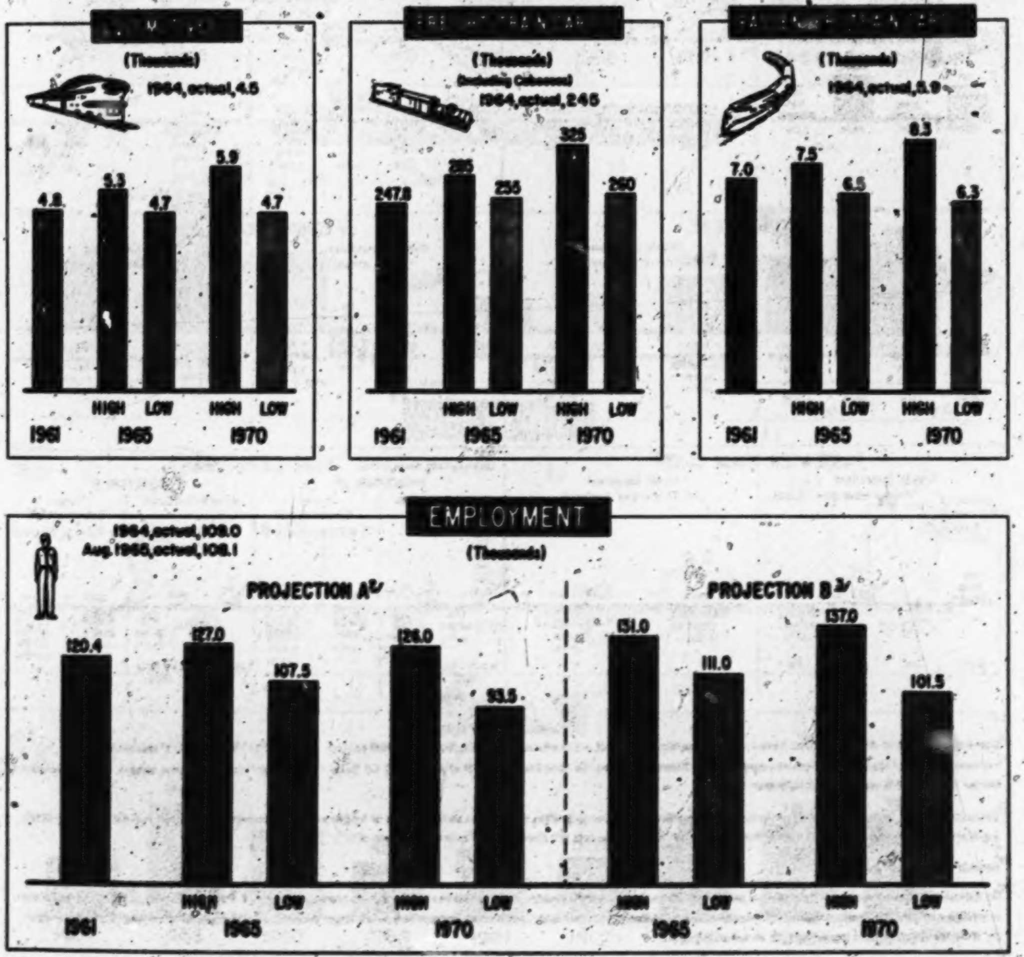
seasonally adjusted Net RR Operating income is about $98 million, net income about $66 million

Basic data: [illegible], ICC;
P.R.R.-N.Y.C.; Merger Exhibits (Synnot)

CHART 9

LOCOMOTIVES, FREIGHT AND PASSENGER CARS, AND EMPLOYMENT – PENNSYLVANIA & N.Y. CENTRAL ACTUAL 1961, AND PROJECTED 1965 AND 1970 AT HIGH & LOW OVERALL ECONOMIC GROWTH RATES

(Note Different Scales)



1/ Number in service at end of year.

2/ Projection A is based on recent productivity trends and a stable work week.

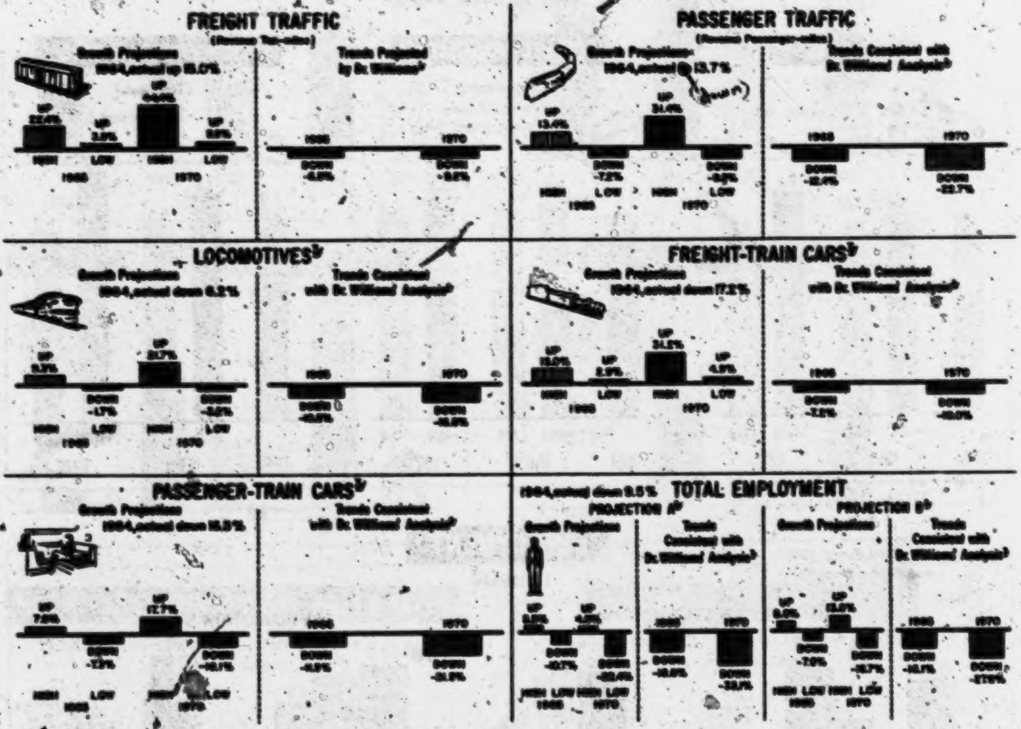
3/ Projection B assumes a decline in the work week of about 1 percent a year.

Basic data: 1961, ICC;
P.R.R.-N.Y.C. Merger Exhibits (Symes)

CHART 10

GROWTH PROJECTIONS TO 1965 AND 1970 PENNSYLVANIA AND NEW YORK CENTRAL COMPARED WITH PROJECTED TRENDS UNDERLYING PROPOSED MERGER

Base Year: 1961



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[1] See charts 7 and 8 of Williams Exhibit, based upon assumption that trends will continue in line with the 1950–1960 pattern. (See pp. 75–79 of Williams' testimony.) Perlman (p. [illegible] of testimony) apparently agrees with Williams' estimates. So does Grant (p. [illegible] of testimony). Cf. Symes (Exhibit, p. 11) who estimates solely in consequence of the merger itself a [illegible]% reduction in freight train miles.

[2] While Dr. Williams makes no specific projections of projections of passenger traffic, he assumes, as in the case of freight traffic, a continuation of the trends during 1950–1960. As to passenger traffic, Symes (p. [illegible] of testimony) says Pennsylvania and N.Y. Central have "entirely too much of it."

[3] Number in service at end of year.

[4] Dr. Williams makes no projected estimates of needed facilities, but the trends projected on the chart correlate with his traffic analysis. Cf. Patchell (Exhibit, p. [illegible]), who estimates a reduction of [illegible] locomotives (about [illegible]%) in consequence of the merger. But this is not inconsistent with the much larger reductions in locomotives which would correlate with Dr. Williams' freight traffic projections, as shown on the chart.

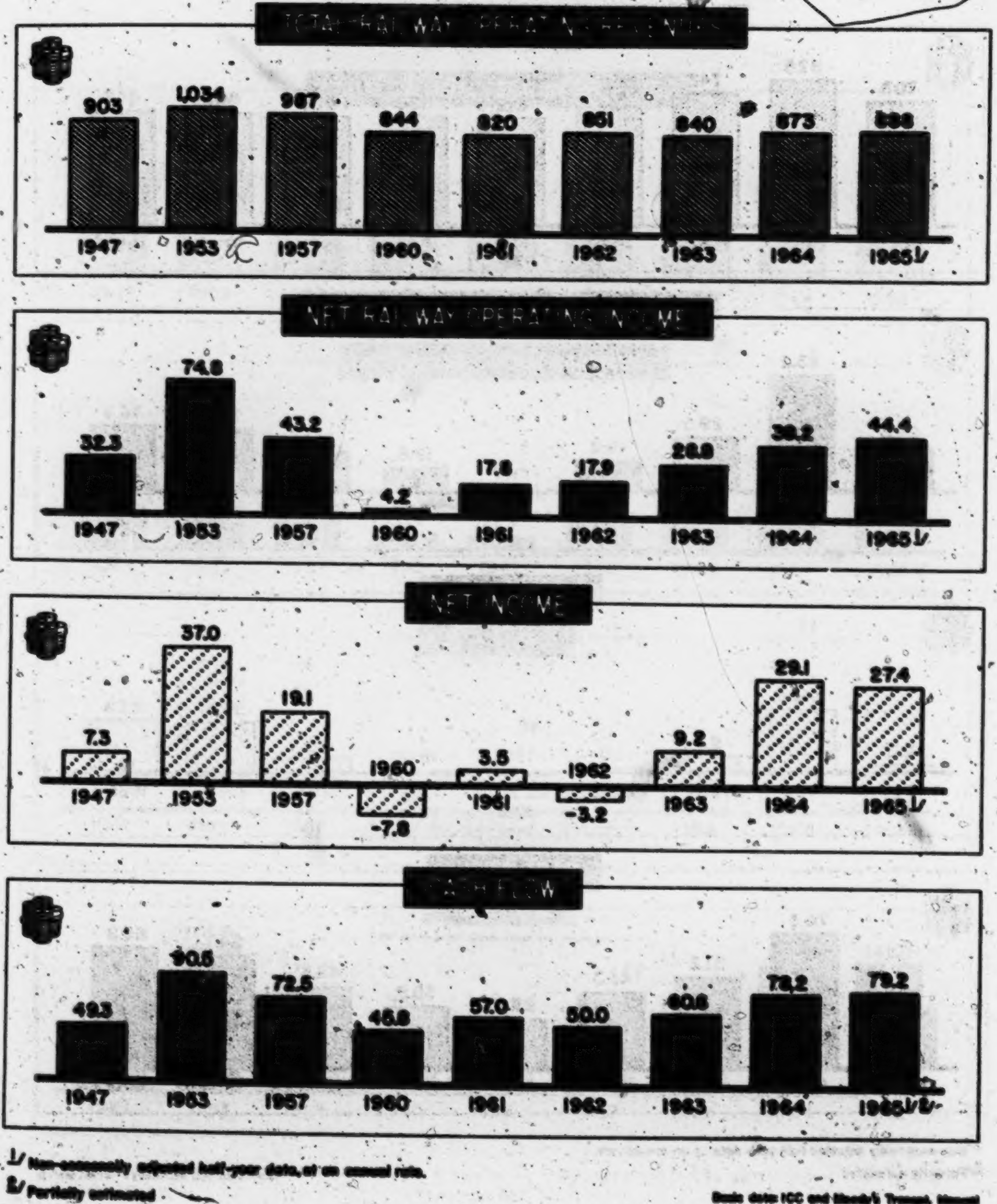
[5] Assumes no changes in basic average working hours. [6] Assumes about one percent per year decline in average working hours per employee.

[7] Dr. Williams makes no projected estimates of employment, but the trends projected on the chart correlate with his traffic analyses. The trends projected on the chart make no allowance for employment declines of more than one percent a year which the companies claim would result directly from the merger. Symes (Exhibit, p. [illegible]) estimates that, within [illegible] years, employment will fall, in consequence of the merger, [illegible]% below the 1961 level.

CHART II

PENNSYLVANIA R.R.- FINANCIAL TRENDS, 1947-1965

(Millions of Dollars)



1/ Non-seasonally adjusted half-year data, at an annual rate.

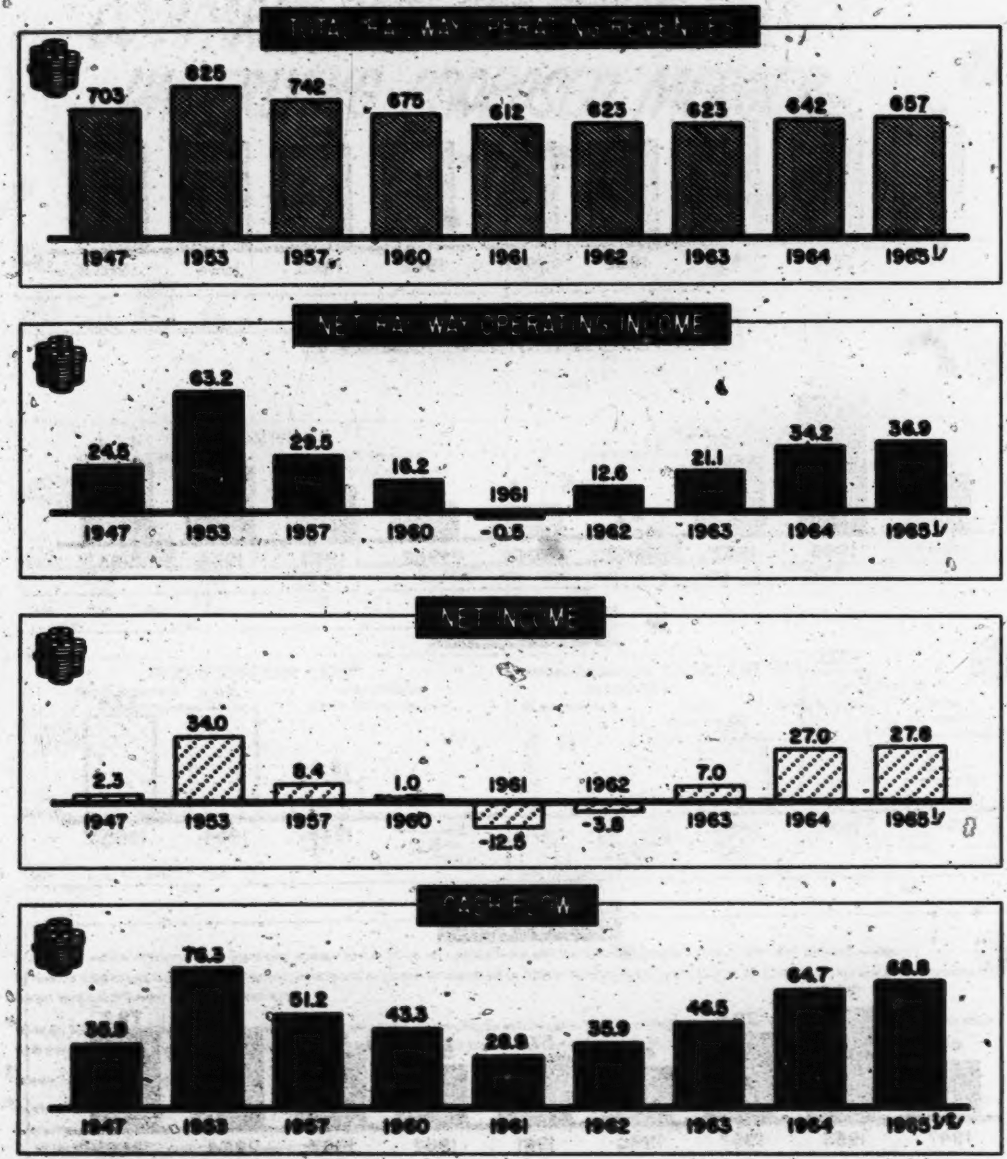
2/ Partially estimated

Basic data: ICC and Moody's Transpt. Manual

CHART 12

N.Y. CENTRAL - FINANCIAL TRENDS, 1947-1965

(Millions of Dollars)



1/ Non-seasonally adjusted half-year data at an annual rate.

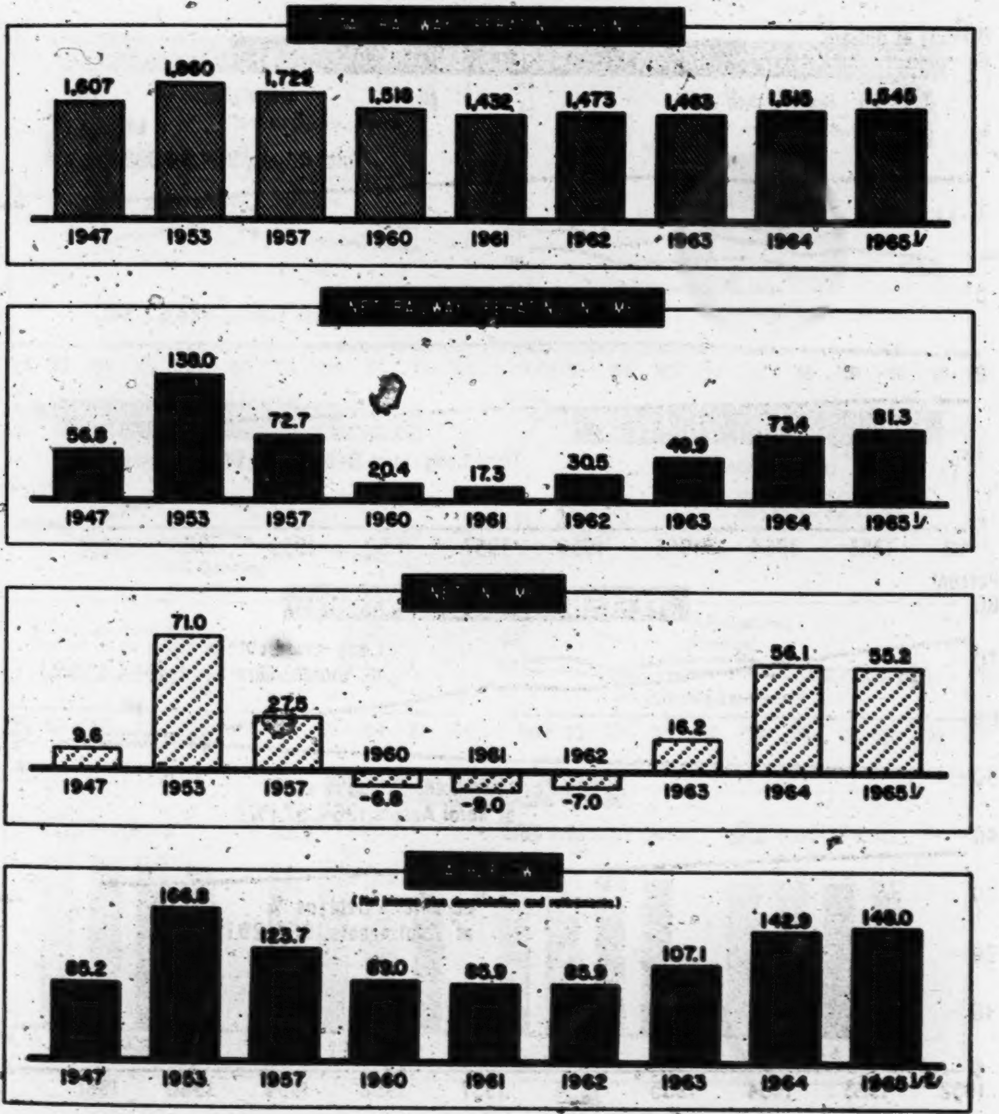
2/ Partially estimated

Basic data: ICC and Moody's Transport Manual

CHART 13

PENNSYLVANIA AND NEW YORK CENTRAL COMBINED FINANCIAL TRENDS, 1947-1965

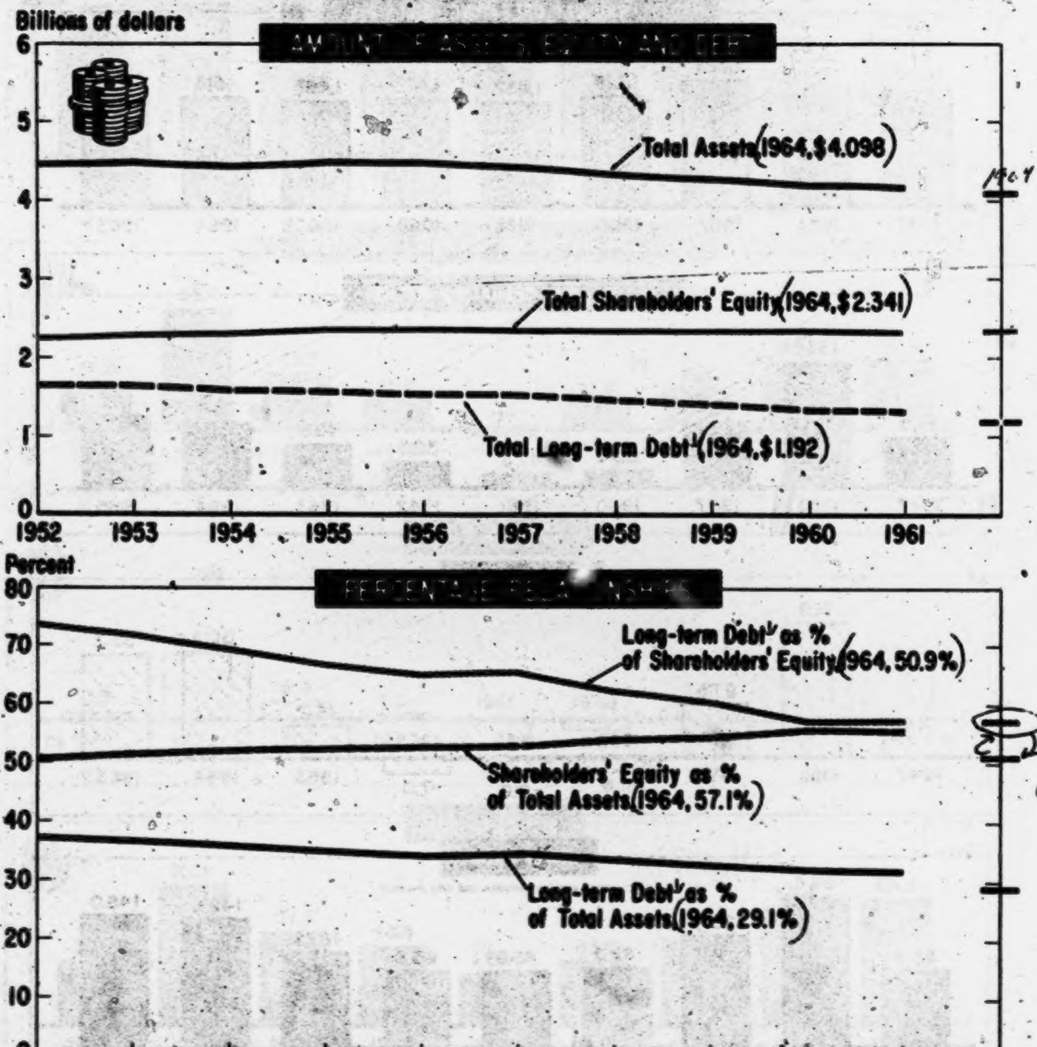
(In Millions of Dollars)



1/Non-seasonally adjusted half-year data at an annual rate. seasonally adjusted net RR operating income about 86 million
2/Partially estimated

CHART 14

TOTAL ASSETS, SHAREHOLDERS' EQUITY AND LONG TERM DEBTS PENNSYLVANIA AND N.Y. CENTRAL, 1952-1964

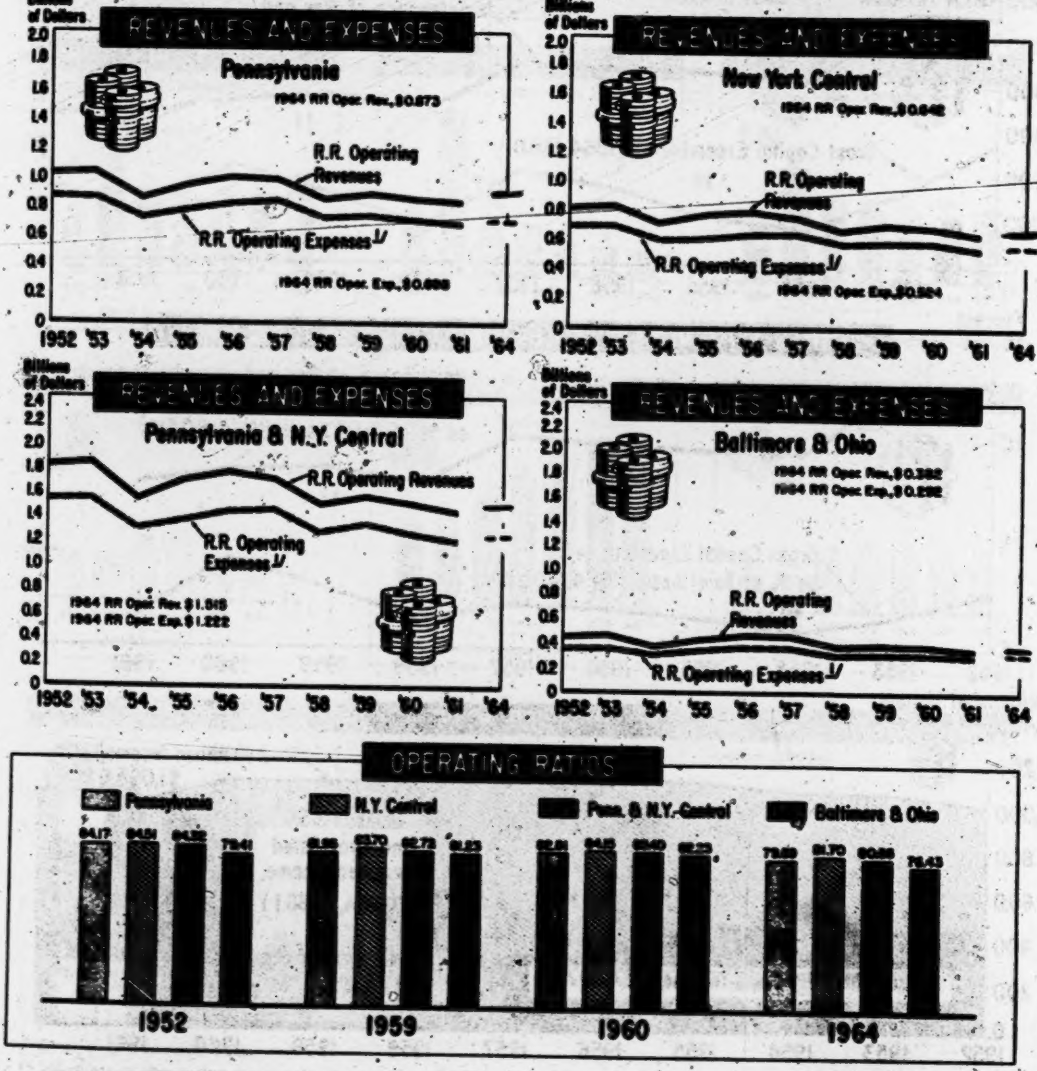


1/ Pennsylvania R.R. includes leased lines. 1964 data from Standard and Poor.

Basic data: P.R.R.-Merger Exhibits (Ward);
N.Y. Central-Merger Exhibits (Grant)
I.C.C.

CHART 15

RAILWAY OPERATING EXPENSES, REVENUES AND OPERATING RATIOS, 1952-1964 PENNSYLVANIA, N.Y. CENTRAL & BALTIMORE & OHIO



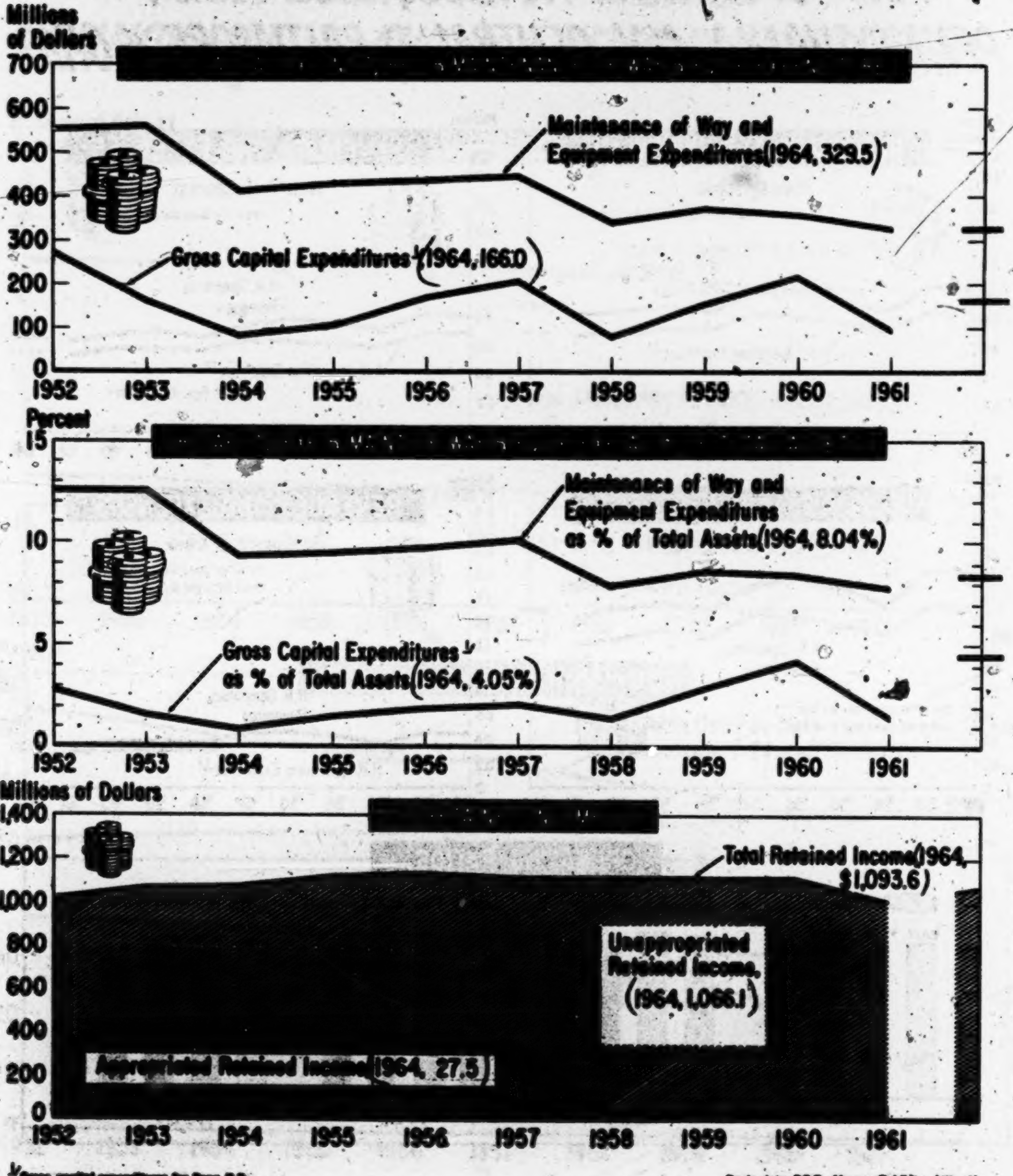
1/ Excludes railway tax accruals and equipment and joint facility rentals.

2/ Railway operating expenses as a percent of railway operating revenues.

Basic data: P.R.R. Merger Exhibits (Carpi);
N.Y. Central Merger Exhibits (Grant);
Balt. & Ohio: Moody's Transpt. Manual.

CHART 16

SELECTED OUTLAYS AND RETAINED INCOME PENNSYLVANIA AND N.Y. CENTRAL, 1952-1964

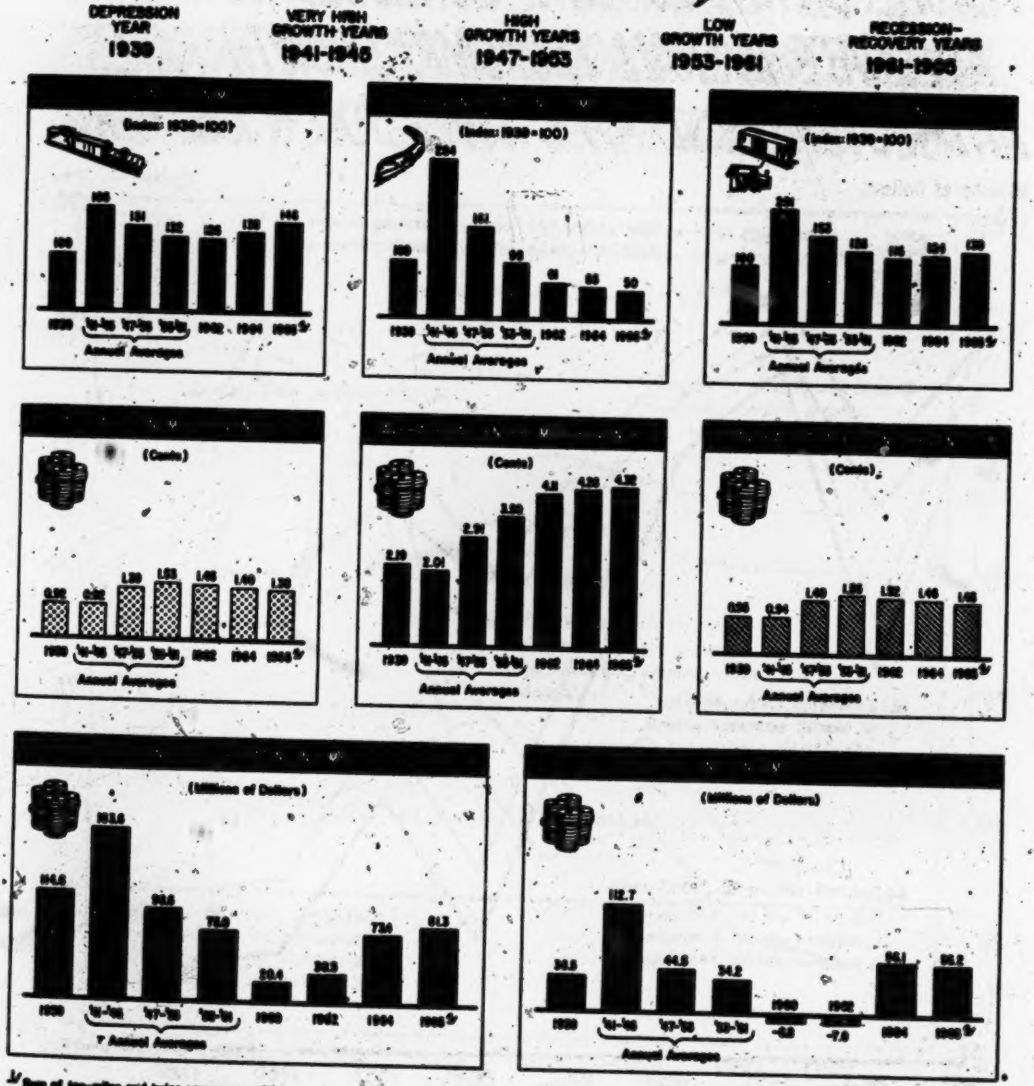


[1] Gross capital expenditures for Penn.R.R. include leased lines.

Basic data: P.R.R.-Merger Exhibits (Ward)
N.Y. Central-Merger Exhibits (Grant)

CHART 17

RAILROAD TRAFFIC, PER UNIT REVENUE, & INCOME PENNSYLVANIA AND N.Y. CENTRAL, 1939-1965 (CURRENT DOLLARS)



1/ Sum of ton-miles and twice passenger-miles.

2/ Total railway operating revenues, less total operating expenses and taxes and rentals

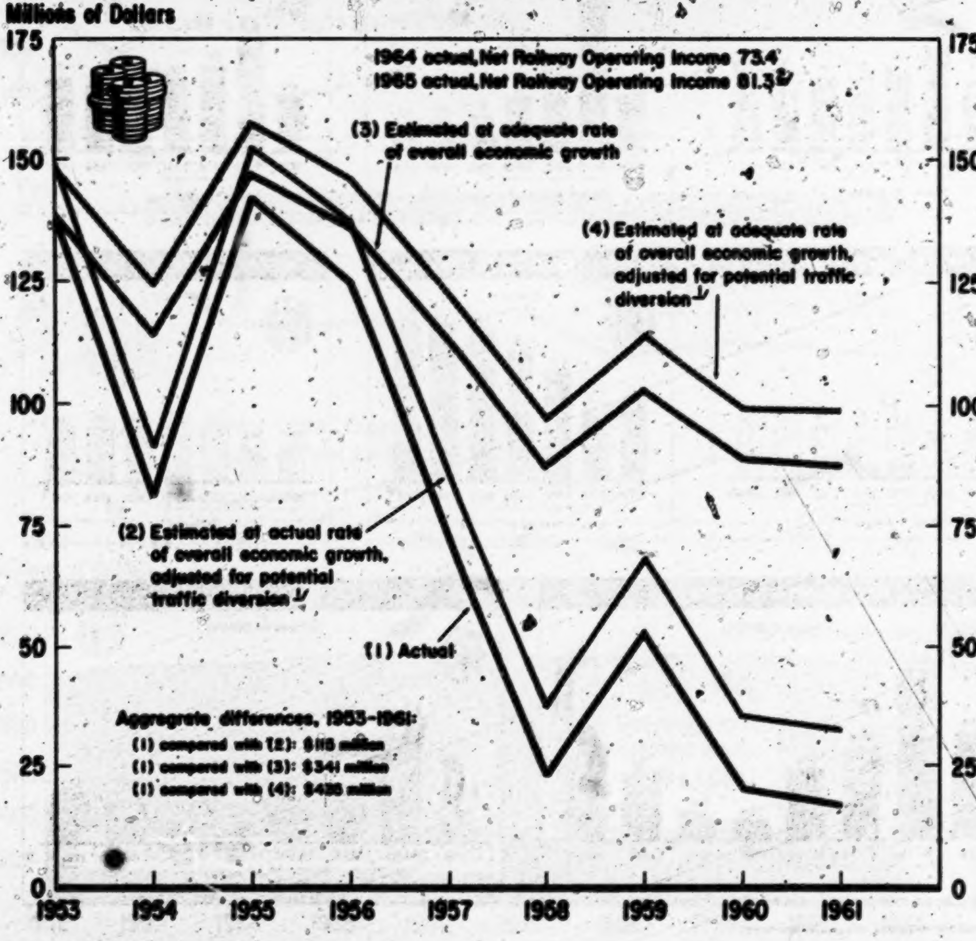
3/ Net railway operating income plus other income (non-operating), less fixed and contingent charges and miscellaneous deductions.

5/ Non-seasonally adjusted half-year data at an annual rate. considerably higher on seasonally adjusted basis

Basic data: ICC and Moody's Transport Manual
P.R.R.-N.Y.C. Merger Exhibits (Dyson)

CHART 18

NET RAILWAY OPERATING INCOME AFTER TAXES PENNSYLVANIA AND NEW YORK CENTRAL ACTUAL COMPARED WITH ESTIMATED LEVELS AT ADEQUATE OVERALL ECONOMIC GROWTH RATES AND POTENTIAL TRAFFIC DIVERSION,[1] 1953-1961



1964 actual, Net Railway Operating Income 73.4
1965 actual, Net Railway Operating Income 81.3[2]

Aggregrate differences, 1953-1961:
(1) compared with (2): $115 million
(1) compared with (3): $341 million
(1) compared with (4): $420 million

Basic data: Actual, Moody's Transpt. Manual

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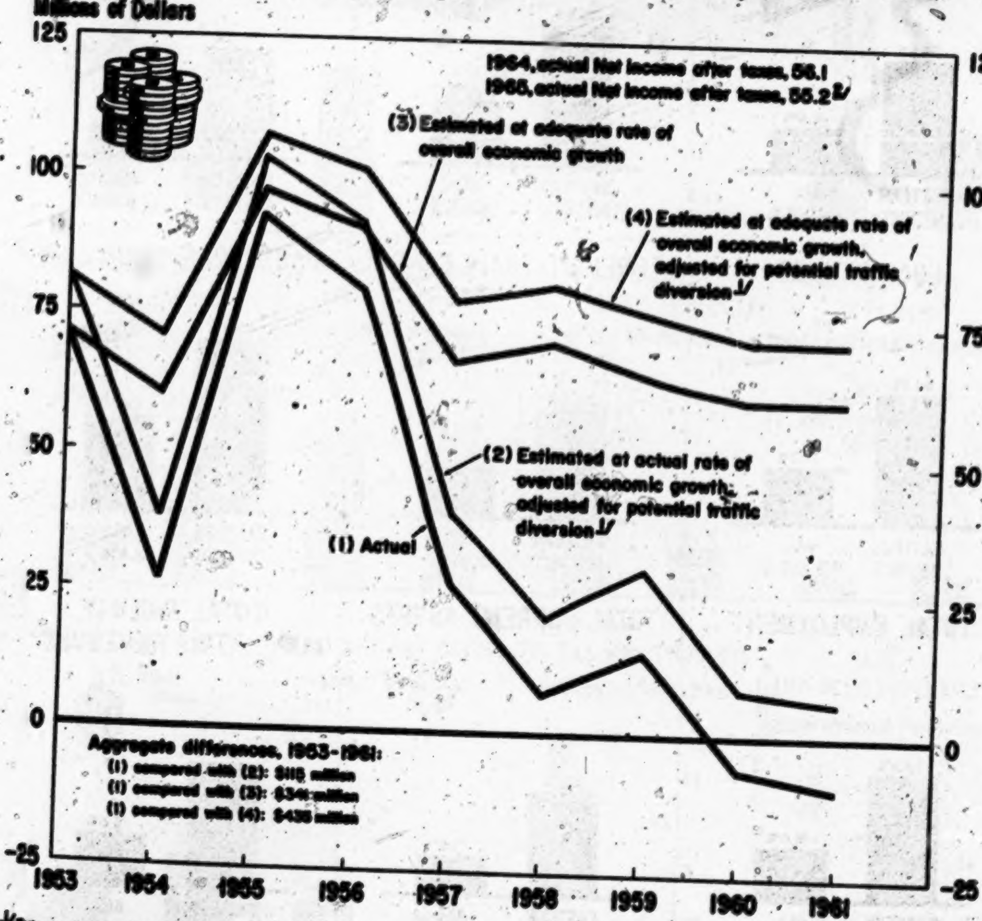
[1] Estimate of potential additional traffic which could accrue to the railroads with feasibly lower freight rates to improve the railroads' competitive position vis-à-vis other modes of transportation.

[2] Non-seasonally adjusted half-year data, at an annual rate. Seasonally adjusted $78 million

CHART 19

NET INCOME AFTER TAXES PENNSYLVANIA AND N.Y. CENTRAL ACTUAL COMPARED WITH ESTIMATED LEVELS AT ADEQUATE OVERALL ECONOMIC GROWTH RATES AND POTENTIAL TRAFFIC DIVERSION,[1] 1953-1961



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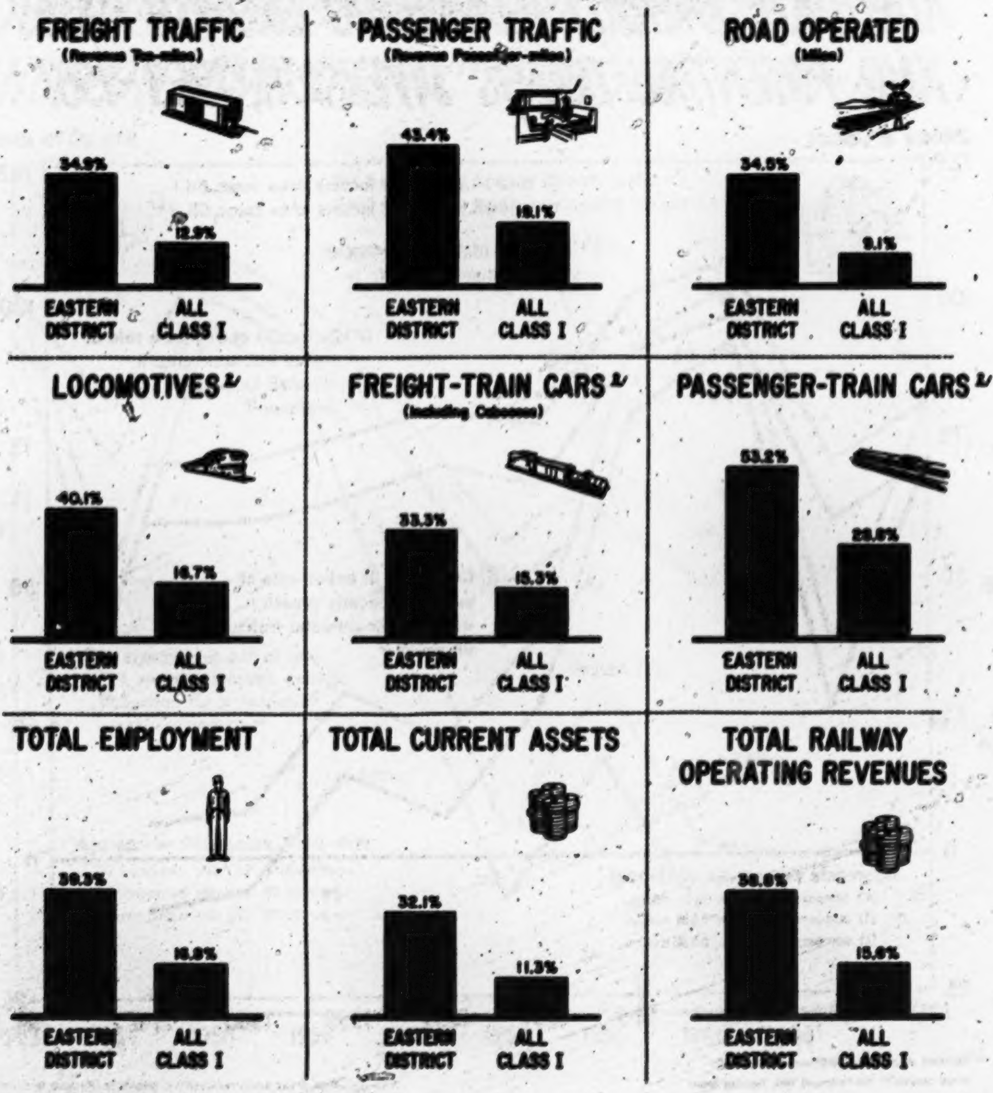
[1] Estimate of potential additional traffic which would accrue to the railroads with feasibly lower freight rates to improve the railroads' competitive position vis-a-vis other modes of transportation.

[2] Non-seasonally adjusted half-year data, at an annual rate. seasonally adjusted, $66 million

Basic data: Actual, Moody's Transport Manual

CHART 20

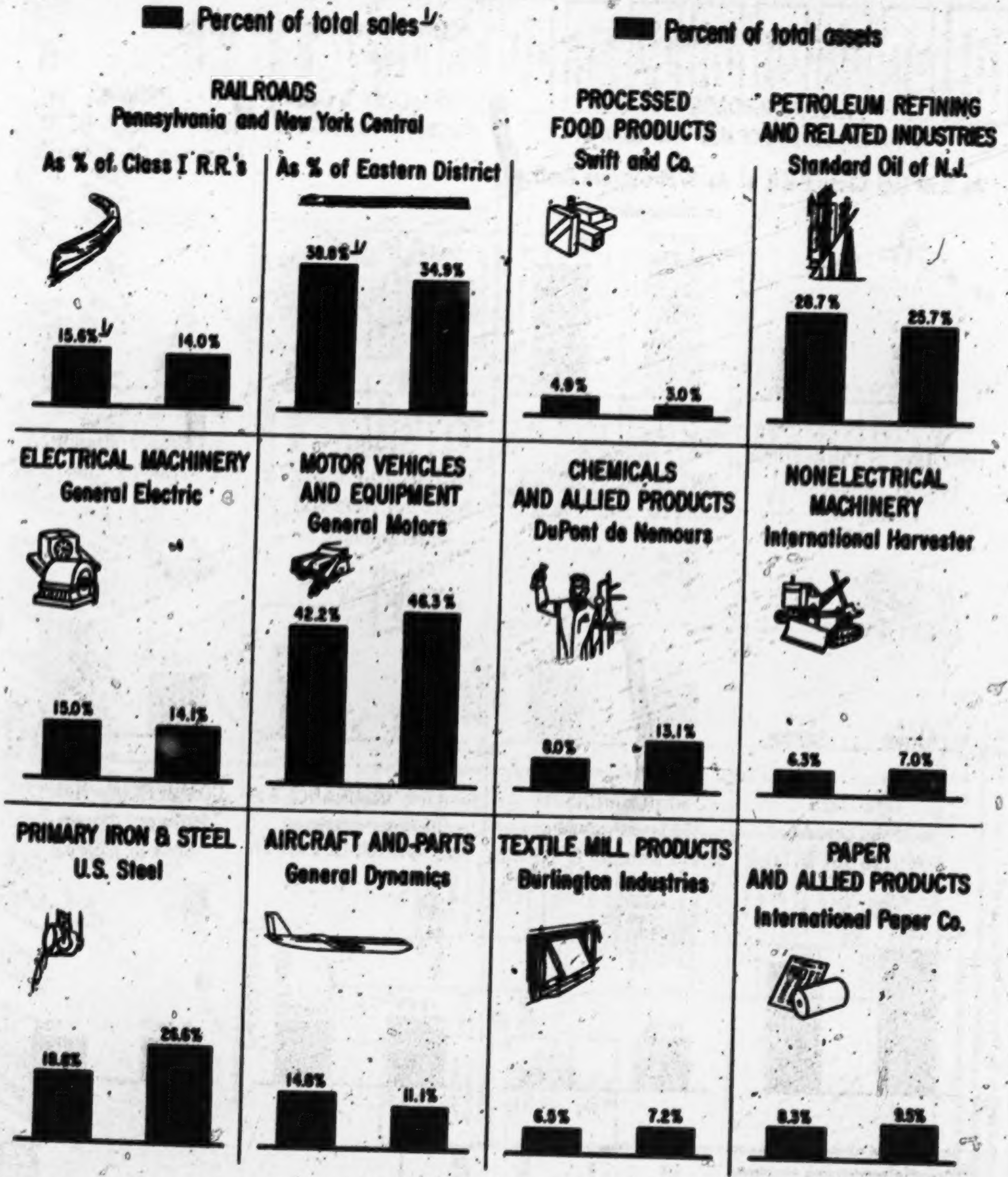
PENNSYLVANIA AND NEW YORK CENTRAL COMBINED SIZE COMPARED WITH EASTERN DISTRICT 1/ RAILROADS AND WITH ALL CLASS I RAILROADS, 1961



1/ Including Pocahontas Region
2/ Number in service at end of year

CHART 21

SALES AND ASSETS OF LEADING COMPANIES MEASURED AS PERCENT OF INDUSTRY TOTAL, 1961

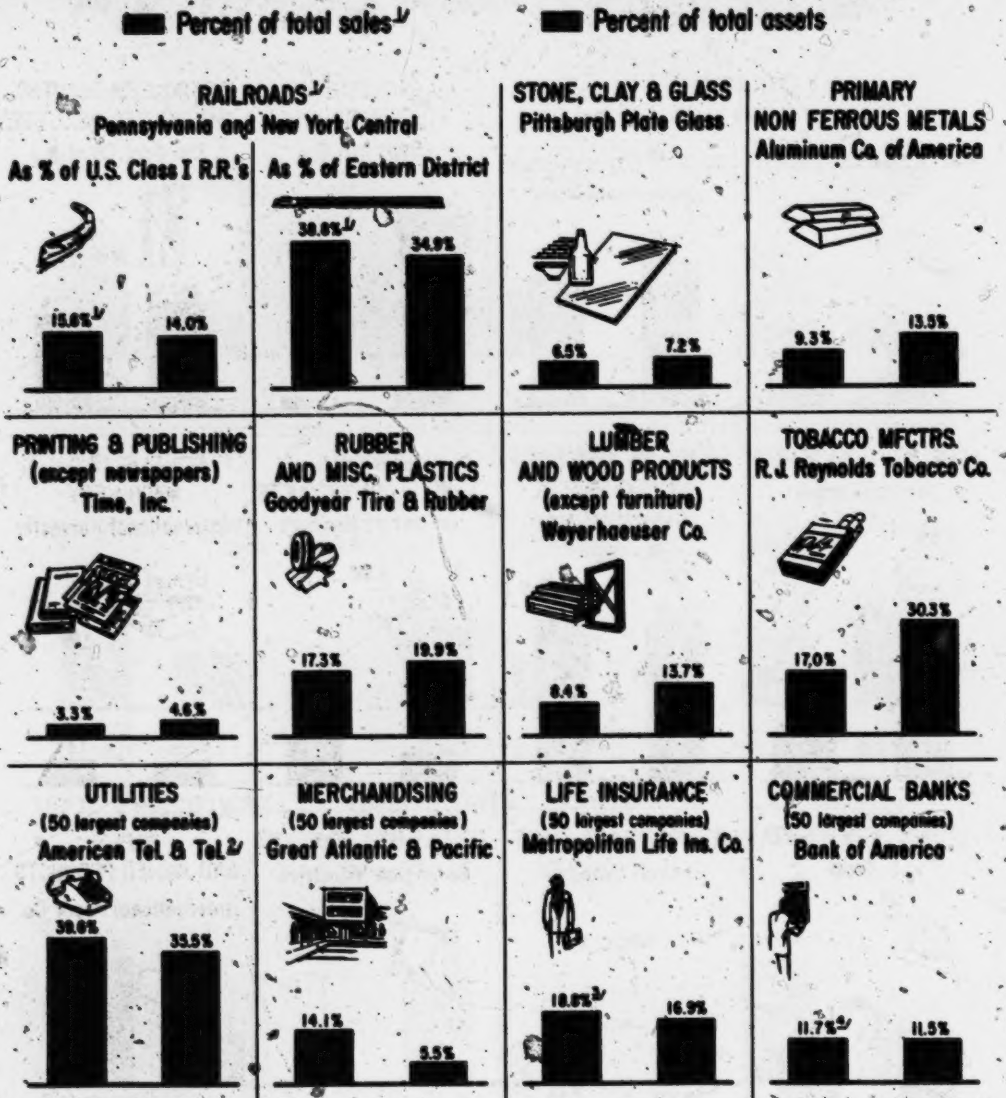


[1] In the case of railroads, gross operating revenues are shown instead of total sales.

Basic data: ICC, FTC-SEC, Fortune Magazine.

CHART 22

SALES AND ASSETS OF LEADING COMPANIES MEASURED AS PERCENT OF INDUSTRY TOTAL, 1961



Basic data: ICC; FTC-SEC; Fortune Magazine

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[1] In the case of railroads, gross operating revenues are shown instead of total sales.

[2] Excluding manufacturing subsidiaries.

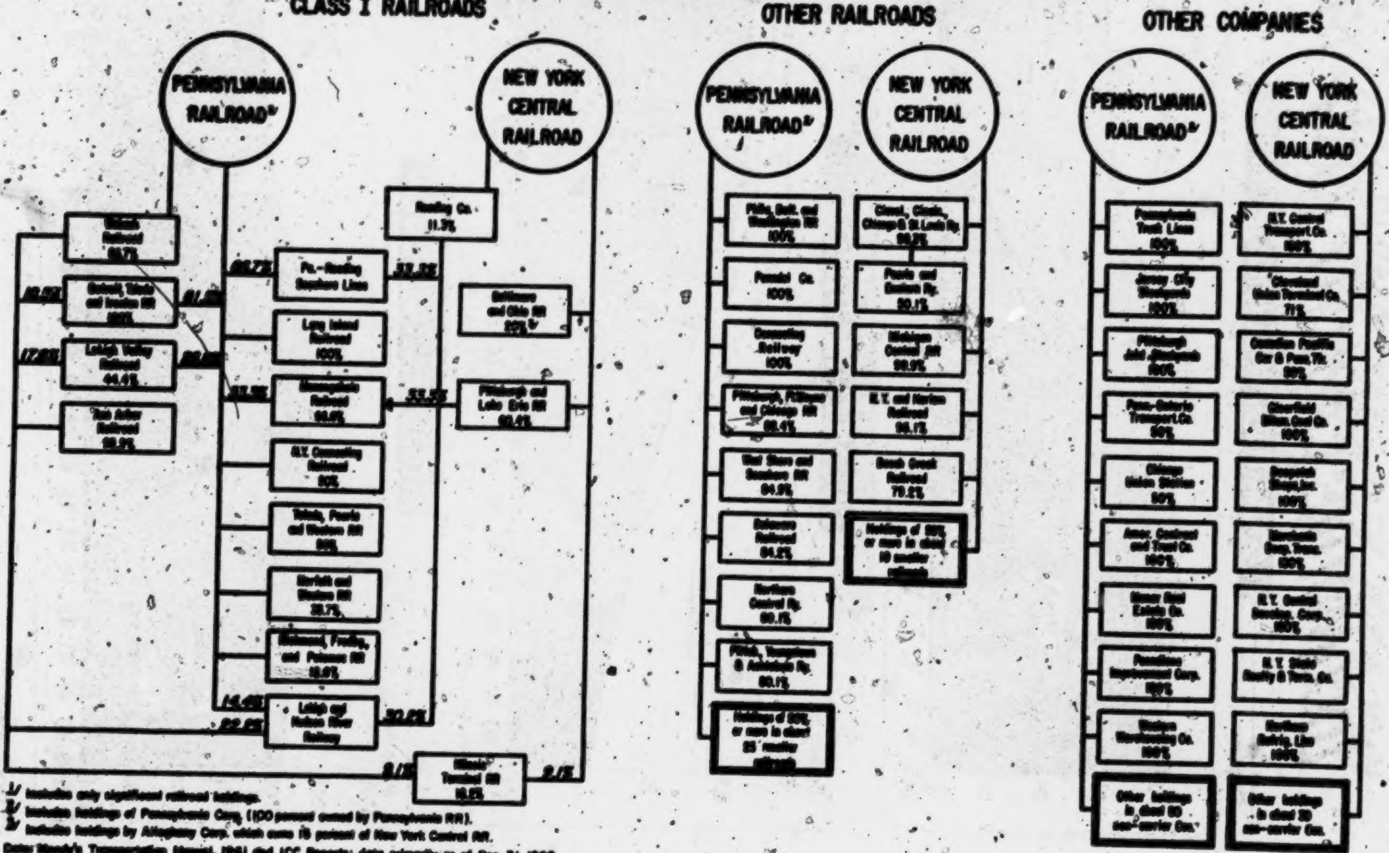
[3] Percent of life insurance in force.

[4] Percent of commercial bank deposits.

CHART 23

HOLDINGS BY PENNSYLVANIA AND NEW YORK CENTRAL RAILROADS OF RAILROADS AND OTHER COMPANIES

(Lines Seeking Merger Shown in Circles)

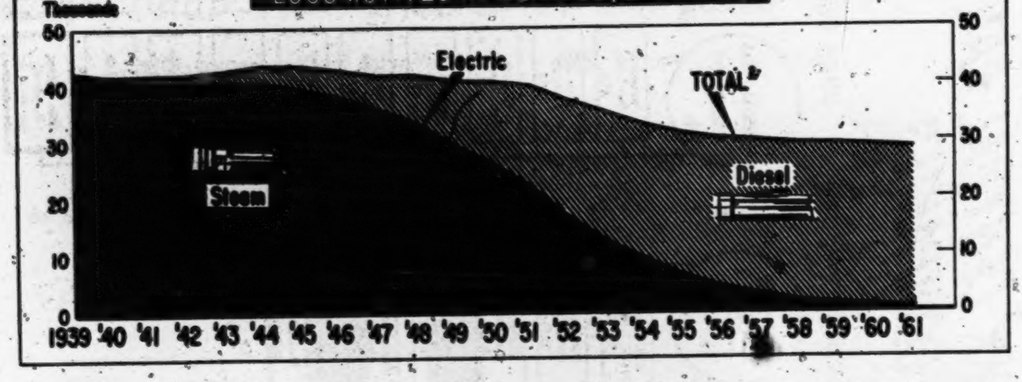

CLASS I RAILROADS
OTHER RAILROADS
OTHER COMPANIES
PENNSYLVANIA RAILROAD 2/
NEW YORK CENTRAL RAILROAD
Wabash Railroad
Detroit, Toledo and Ironton RR
Lehigh Valley Railroad
Ann Arbor Railroad
Pa.-Reading Seashore Lines
Long Island Railroad 100%
Monongahela Railroad
N.Y. Connecting Railroad 50%
Toledo, Peoria and Western RR 50%
Norfolk and Western RR
Richmond, Fredbg. and Potomac RR
Lehigh and Hudson River Railway
Reading Co. 11.3%
Baltimore and Ohio RR 20% 3/
Pittsburgh and Lake Erie RR
Illinois Terminal RR
Phila., Balt. and Washington RR 100%
Pennsdel Co. 100%
Connecting Railway 100%
Pittsburgh, Ft.Wayne and Chicago RR
West Shore and Seashore RR
Delaware Railroad
Northern Central Ry.
Pitts., Youngstown & Ashtabula Ry.
Holdings of 50% or more in about 25 smaller railroads
Cleve., Cinn., Chicago & St. Louis Ry.
Peoria and Eastern Ry. 50.1%
Michigan Central RR 99.9%
N.Y. and Harlem Railroad
Beech Creek Railroad
Holdings of 50% or more in about 10 smaller railroads
Pennsylvania Truck Lines 100%
Jersey City Stockyards 100%
Pittsburgh Joint Stockyards 100%
Penn-Ontario Transport Co. 50%
Chicago Union Station 50%
Amer. Contract and Trust Co. 100%
Manor Real Estate Co. 100%
Improvement Corp. 100%
Western Warehousing Co. 100%
Other holdings in about 60 non-carrier Cos.
N.Y. Central Transport Co. 100%
Cleveland Union Terminal Co. 71%
Canadian Pacific Car & Pass. Tr. 50%
Clearfield Bitum. Coal Co. 100%
Despatch Shops, Inc. 100%
Merchants Desp. Trans. 100%
N.Y. Central Corp. 100%
N.Y. State Realty & Term. Co.
Northern Refrig. Line 100%
Other holdings in about 30 non-carrier Cos.

1/ Includes only significant railroad holdings.
2/ Includes holdings of Pennsylvania Corp. (100 percent owned by Pennsylvania RR).
3/ Includes holdings by Alleghany Corp. which owns 15 percent of New York Central RR.
Data: Moody's Transportation Manual, 1961 and ICC Reports; data primarily as of Dec. 31, 1960.

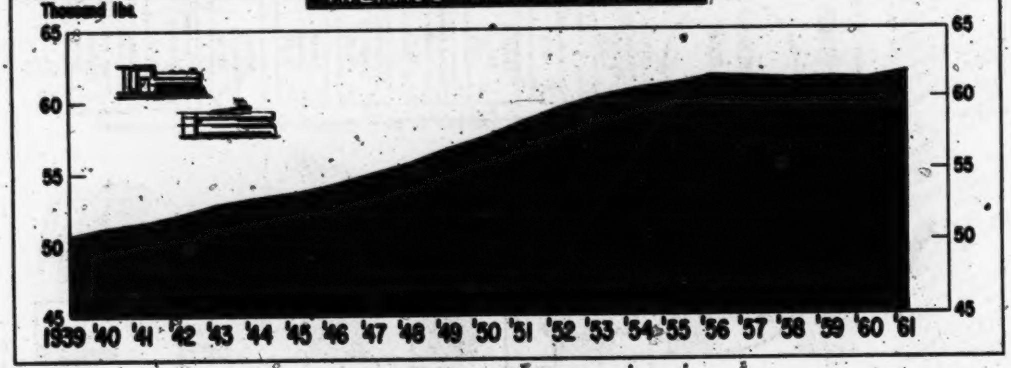
CHART 24

LOCOMOTIVE CAPACITY, 1939-1961[1]

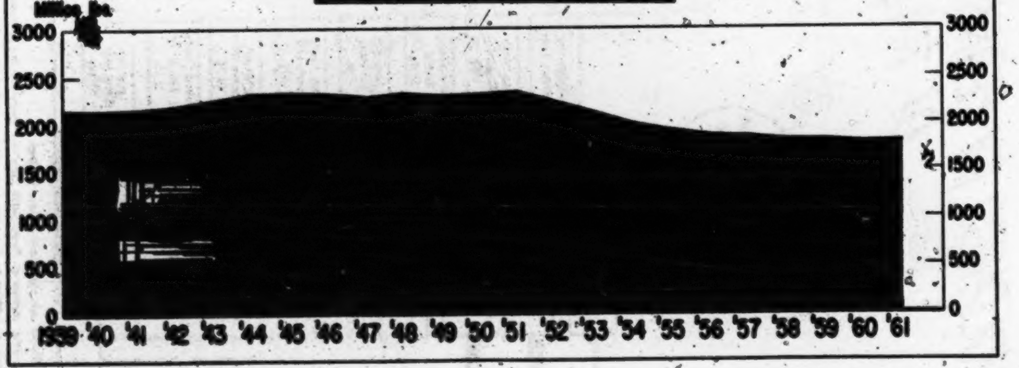
LOCOMOTIVES IN SERVICE, BY TYPES



AVERAGE TRACTIVE POWER



TOTAL TRACTIVE POWER



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[1] Class I railroads

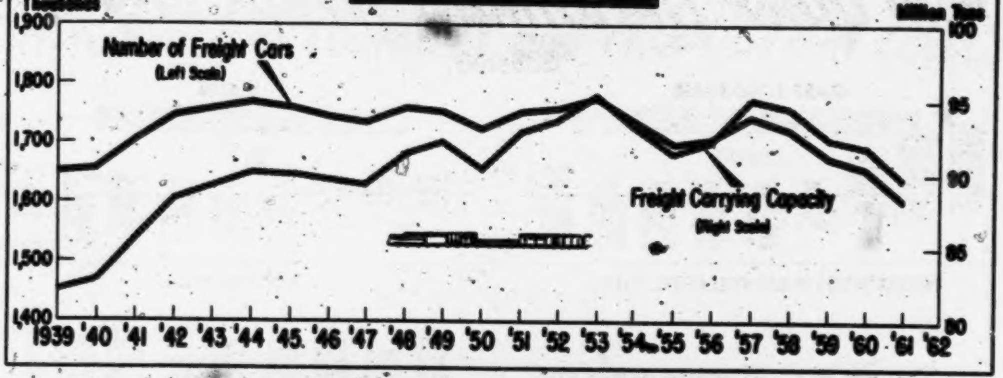
[2] Including small number of other types (maximum of 56 in 1961)

Basic data: ICC and AAR

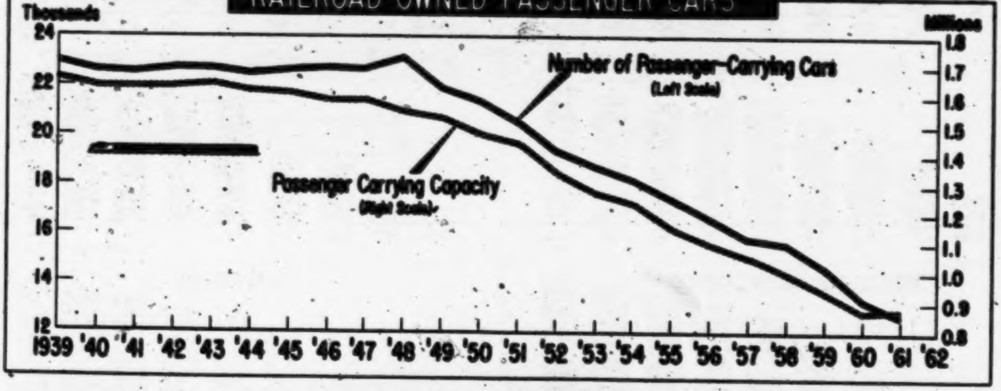
CHART 25

CAR CARRYING CAPACITY, 1939-1961

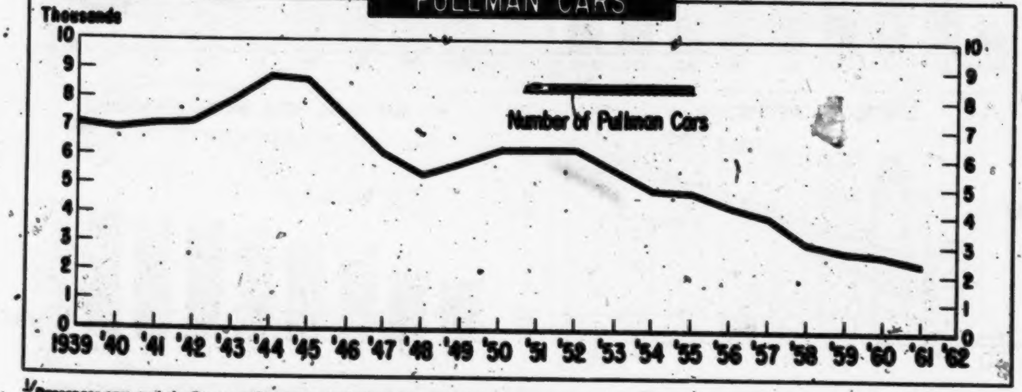
FREIGHT CARS



RAILROAD OWNED PASSENGER CARS



PULLMAN CARS



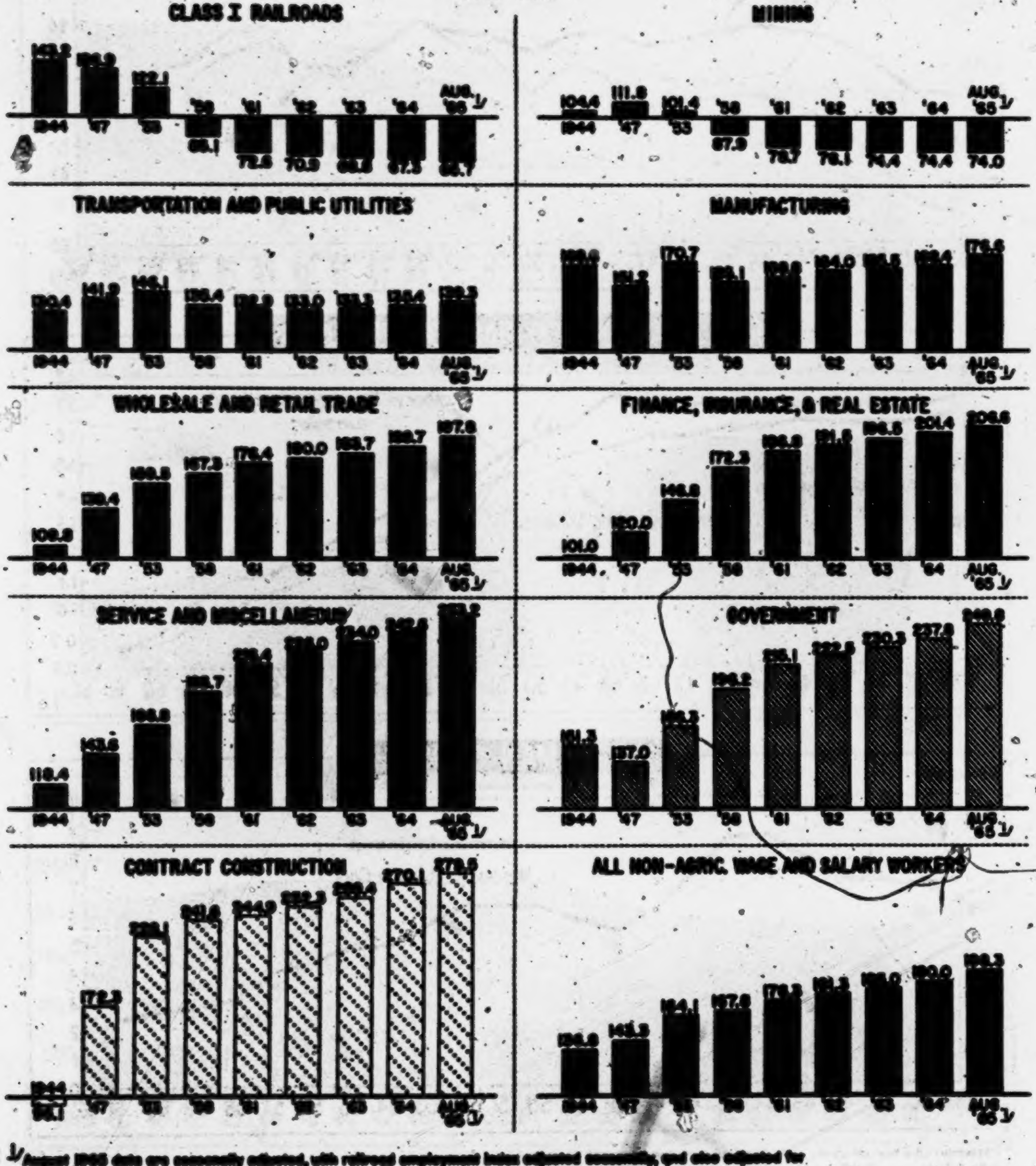
[1] Passenger cars exclude diners, mail, baggage and other passenger-train cars.

Note: Freight cars and RR owned passenger cars are Class I only.

CHART 26

RAILROAD EMPLOYMENT TRENDS COMPARED WITH OTHER EMPLOYMENT TRENDS, 1939-1965[1/]

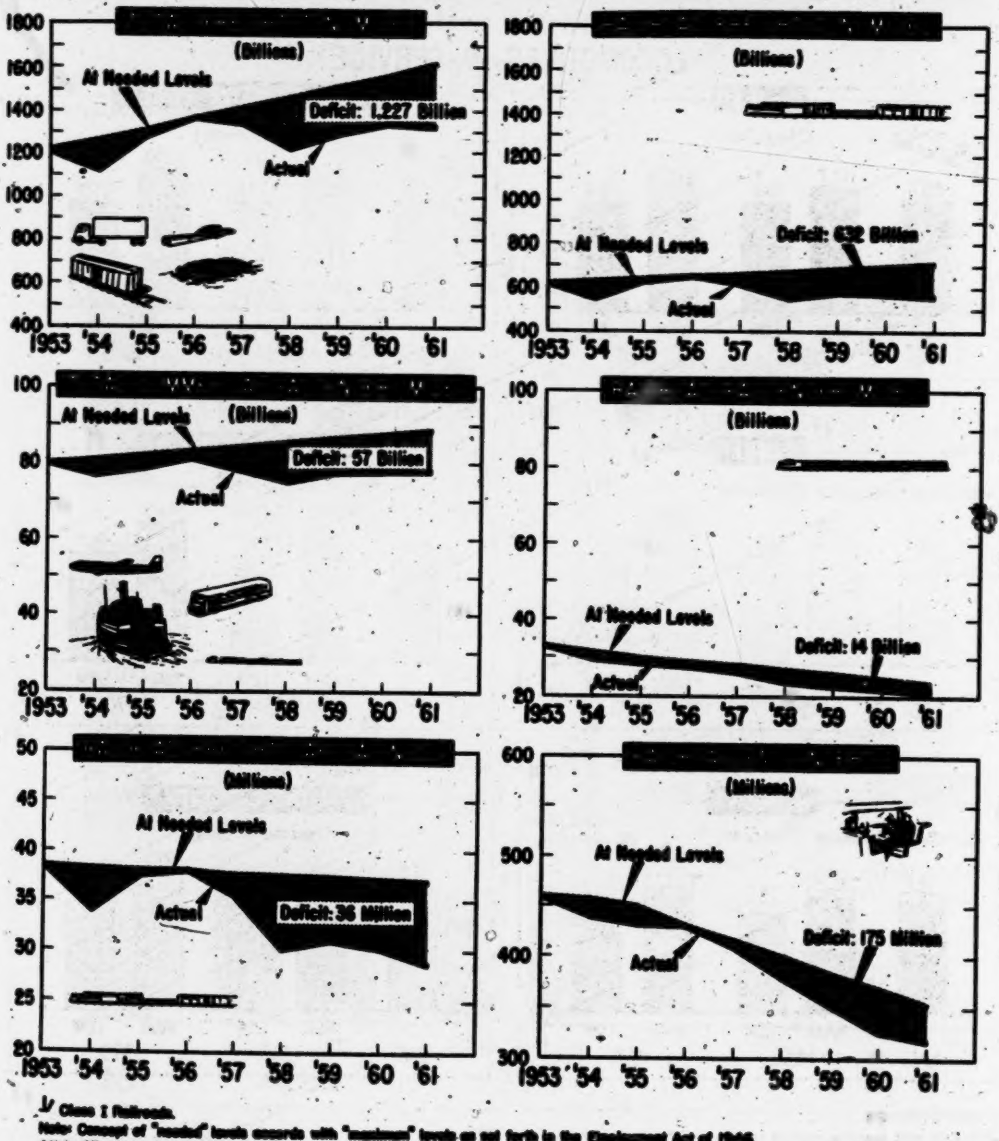
1939=100



[1/] August 1965 data are seasonally adjusted, with railroad employment index adjusted seasonally, and also adjusted for comparability with previous years because as of January 1965 Class I railroads were re-defined to include only those with annual operating revenues of $5 million or more. The unadjusted index for August, 1965 is 66.0.

CHART 27

TOTAL AND RAILROAD TRAFFIC, 1953-1961 COMPARED WITH ESTIMATED VOLUME AT NEEDED NATIONAL EMPLOYMENT and PRODUCTION LEVELS



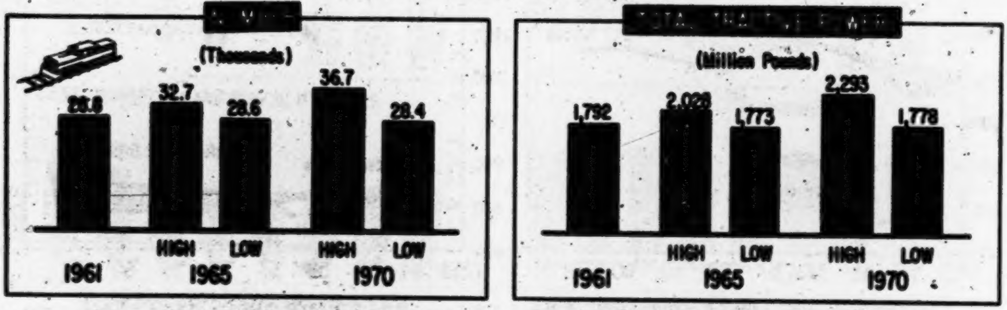
1/ Class I Railroads.
Note: Concept of "needed" levels accords with "maximum" levels as set forth in the Employment Act of 1946.
All traffic shown is intercity.

Basic data: ICC and AAR

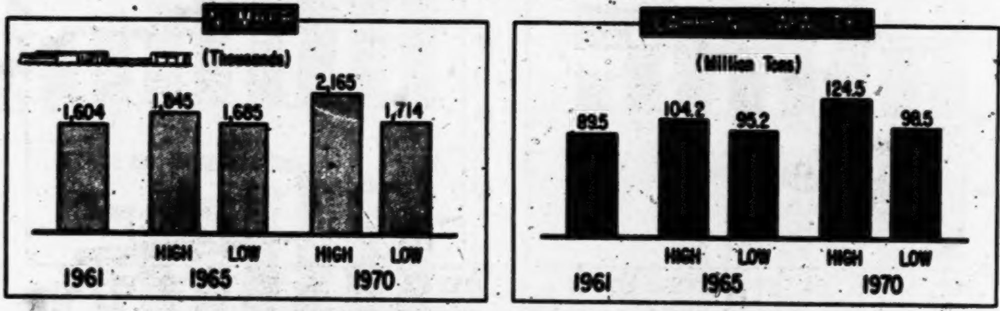
CHART 28

LOCOMOTIVE AND CAR CAPACITIES 1961, and PROJECTED NEEDS 1965 and 1970 AT HIGH and LOW NATIONAL ECONOMIC GROWTH RATES

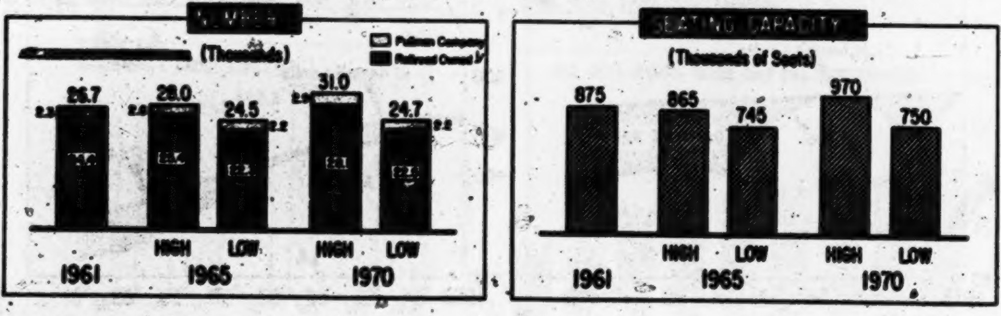
LOCOMOTIVES IN SERVICE[1]



FREIGHT CARS IN SERVICE[1]



PASSENGER TRAIN CARS IN SERVICE



1/ Class I Railroads.

2/ Includes mail, baggage, express and all other passenger-train cars.

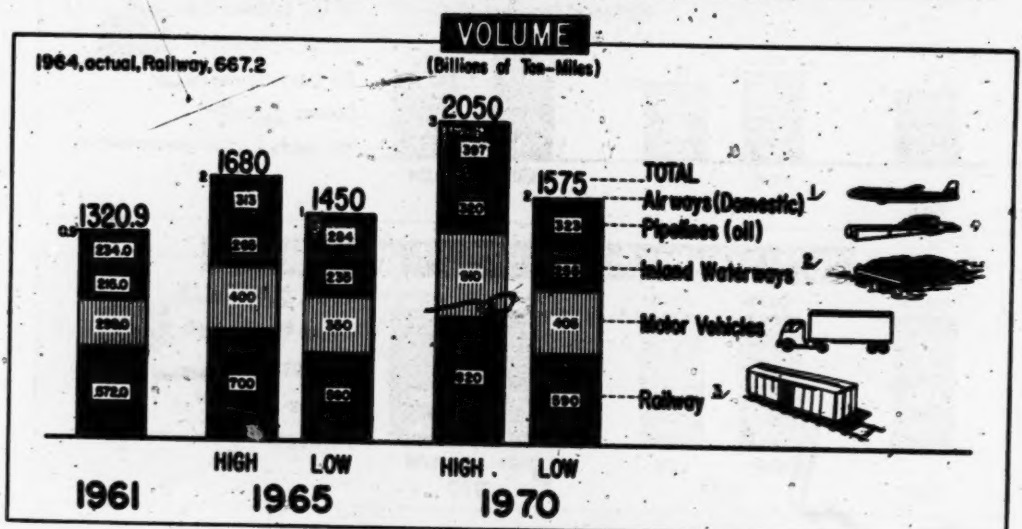
3/ Estimate based on rated passenger carrying capacity of passenger-carrying cars owned or leased by Class I Line-Haul Railroads.

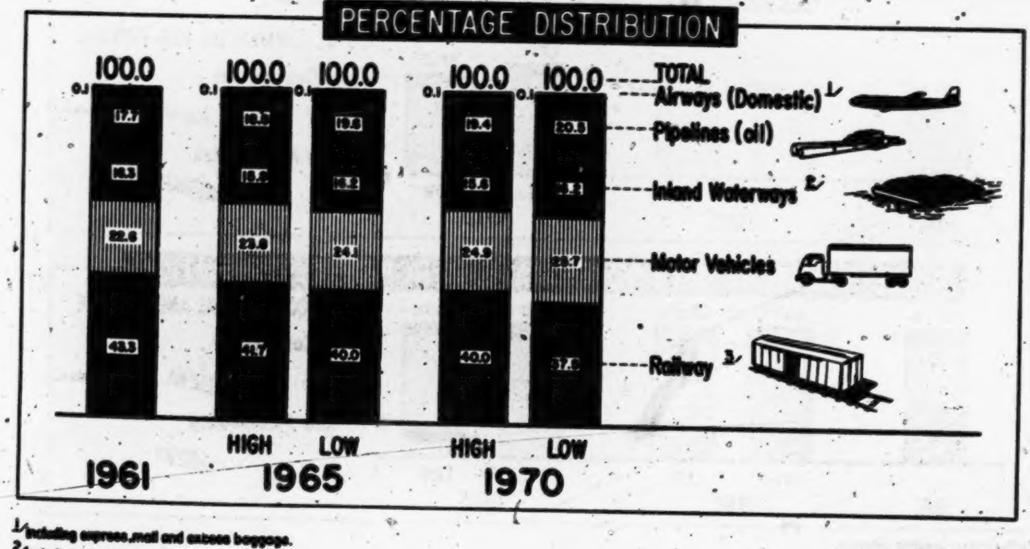
Basic Data: 1961 – AAR

CHART 29

TOTAL INTERCITY FREIGHT TRAFFIC 1961, and PROJECTED NEEDS 1965 and 1970 AT HIGH and LOW NATIONAL ECONOMIC GROWTH RATES

(Excluding Coastwise and Intercoastal Traffic)





[1] Including express, mail and excess baggage.

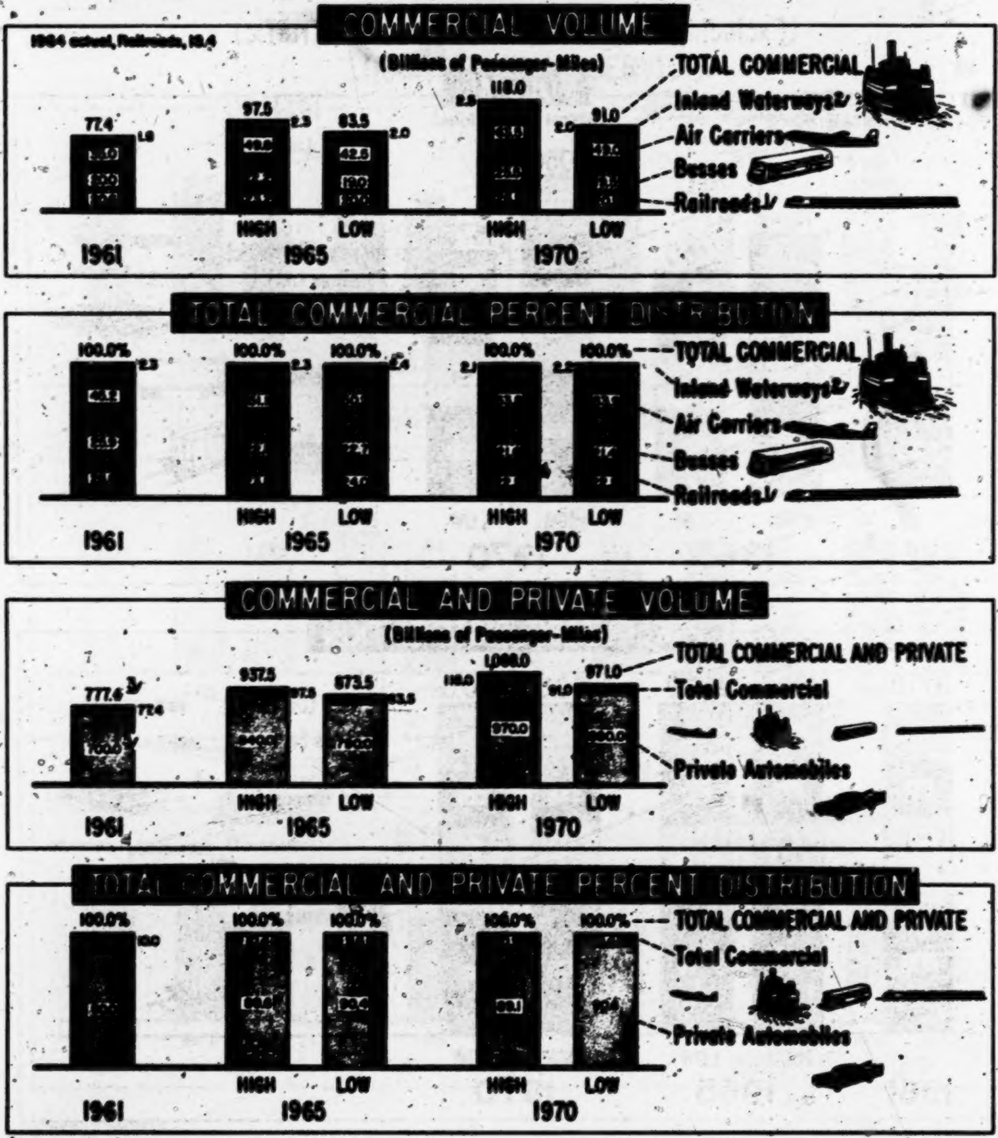
[2] Including Great Lakes.

[3] Revenue ton-miles including electric railways, express and mail.

Basic data: 1961–AAR

CHART 30

TOTAL INTERCITY PASSENGER TRAFFIC 1961, and PROJECTED NEEDS 1965 and 1970 AT HIGH and LOW NATIONAL ECONOMIC GROWTH RATES



1/ Including electric railways.

2/ Including Great Lakes.

Basic data 1961 -AAR

C

United States District Court

Southern District of New York

ERIE-LACKAWANNA RAILROAD COMPANY,
Plaintiff,
—against—
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

66 Civil No. 2860

MEMORANDUM IN SUPPORT OF INTERLOCUTORY INJUNCTION ON BEHALF OF CITY OF HOBOKEN, CITY OF UNION CITY, TOWNSHIP OF NORTH BERGEN, TOWN OF WEST NEW YORK, TOWNSHIP OF WEEHAWKEN AND CITY OF JERSEY CITY

Preliminary Statement

Plaintiffs, City of Hoboken, City of Union City, Township of North Bergen, Town of West New York, Township of Weehawken and City of Jersey City, request this Court to issue an interlocutory injunction so as to prevent the consummation of this proposed merger pending review of the Interstate Commerce Commission Reports and Orders on the merits.

The injury facing plaintiffs is irreparable. It is even found in the Recommended Report of the Hearing Examiner in their section dealing with the State of New Jersey, and such injury is patent on its face. (Rec. Rep., pp. 239-242)

The conclusions of the Examiners with respect to cities in New Jersey may be found at pages 280-286 of their Report. These conclusions were adopted by the Commission in its Report dated April 6, 1966, and upheld upon reconsideration.

I. THESE NEW JERSEY CITIES ARE IMPORTANT.

The 1960 census data shows the following population figures for plaintiffs, and these published figures are understated because of normal population growth in the intervening 6 years.

City of Hoboken	47,000
City of Union City	52,000
Town of Weehawken	14,000
City of North Bergen	42,000
City of West New York	36,000
City of Jersey City	270,000
Total Represented	461,000

Counsel for plaintiffs herein respectfully submit that the above population represents a significant segment of the public which cannot factually or lawfully be ignored.

II. THE PROTECTIVE CONDITIONS TOTALLY DISREGARD THESE CITIES.

Although the traffic conditions in Appendix G to the April 6, 1966, Report of the Interstate Commerce Commission, as amended September 16, 1966, upon reconsideration, may reduce the injury to certain railroads serving New Jersey in that they may be able to recover damages, there is absolutely no indemnification for the cities represented herein which will suffer grevious injury by reduced service, traffic diversion from their railroads, re-routing of traffic away from their cities even though perhaps still transported by the same railroad, and dollars earned by railroad employees who will lose their jobs or be transferred to other positions away from their present tax paying residences. And not the least of troublesome problems and consequent injury, is the impact of more automobiles and trucks on the streets of these cities which would be caused by an elimination and curtailment of railroad traffic.

The Interstate Commerce Commission has dealt with this merger as if it were a battle between railroads, rather than as a grave problem facing the public.

III. THE INJURY FACING THESE PLAINTIFF-COMMUNITIES IS IRREPARABLE.

A crying example of irreparable injury to plaintiffs *herein*, which demands an interlocutory injunction, is described by the Examiners. (Rec. Rep. p. 241):

> "Intervenors Weehawken and West New York oppose the merger on the grounds that elimination or curtailment of New York Central's railroad properties as proposed would constitute an elimination of substantial tax ratables and receipts. In Weehawken alone, New York Central facilities constitute 30 per cent of all assessable properties."

This Court is urged not to allow the utter destruction and ruin of the financial base for the government of Weehawken without even a hearing on the merits.

What is to happen to the cities of Jersey City and Hoboken? Although the Erie-Lackawanna may be compensated by elimination or destruction of its large freight and passenger terminals located thereat, who is going to compensate these cities for its loss in employment, tax base reduction, loss of retail sales, loss of interests and foreign commerce delivered to their marine facilities, overall depreciation and deterioration of properties, etc., etc.?

IV. THE PUBLIC INTEREST DEMANDS AN INTERLOCUTORY INJUNCTION.

The Examiners hold that plaintiffs herein are without a remedy under the Interstate Commerce Act, and further, that their claims of adverse impact from the proposed merger *cannot even be considered as part of the public interest in evaluating the merger*. (See particularly footnote 154, Rec. Report., p. 392)

The decisions relied upon by the Examiners, and thus the Commission, since it did not reject this aspect of the Examiners Report, ignore the important amendment to the Interstate Commerce Act known as the National Transportation Policy, enacted in 1940. The Examiners also do not come to grips with subsequent legislation affecting transportation. In particular, there has been enacted recent legislation (Mass Transportation Act of 1966, signed into law by President Johnson on or about September 15, 1966) affecting urban transportation which the Commission must consider as part of the "public interest." The above legislation was sponsored by Harrison J. Williams, Jr., U. S. Senator, State of New Jersey.

The Report of the Commission, upon reconsideration, notes in its Report that it has a duty to enforce "other legislation relating to rail transport," but, we respectfully submit, it erroneously fails to rule as a matter of law, consistent with the decision of the Supreme Court that *other legislation* refers to the policies of such legislation dealing with transportation, not merely new legislation by which the Commission is given increased regulatory power. *McLean Trucking v. United States*, 321 U.S. 67 (1944).

Apart from the evolving concept of the "public interest," Section 5(2) (c) of the Interstate Commerce Act specifically requires the Commission to consider other factors than the four enumerated therein since the language employed is "among others." Accordingly, under either the "public interest" or Section 5(2) (c) itself, the Commission has committed a serious error of law which will irreparably injure plaintiff communities and requires the use of this Court's injunctive power.

Plaintiffs have a strong case on the merits. This strong case should not be rendered meaningless by consummation of the merger through refusal of an interlocutory injunction.

V. THE SITUATION HEREIN DIFFERS FROM THAT IN VIRGINIA PETROLEUM JOBBERS vs. FEDERAL POWER COMMISSION. 259 Fed. 2nd 921.

This Court has jurisdiction by Statute to stay the merger *pendente lite.*

As the Supreme Court has pointed out:

> ". . . Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." *Scripps-Howard vs. Federal Communications Commission.* 1942, 316 U.S. 4, 11.

Parties aggrieved by administrative agency orders act as representatives of the public interest in seeking judicial review. In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes. As it is principally the protection of the public interest with which we are concerned, no artificial restrictions of the Court's power to grant equitable relief in the furtherance of that interest can be acknowledged, *Scripps-Howard vs. Commission, supra* cf. *Yakus vs. United States,* 1944, 321 U.S. 414.

In the *Jobbers* case, hearings had been concluded and judicial review at the District Court level obtained. The U. S. District Court for the District of Columbia denied a temporary restraining order pending appeal. In *Penn-Central,* the hearings have not been concluded nor has there been any judicial review.

In *Jobbers,* in a *per curiam* opinion, the Circuit Court pointed out, *Jobbers* had an adequate remedy within the four corners of the Act, so that its petition for an extraordinary writ of injunction was properly dismissed. Under the present posture of *Penn-Central,* plaintiff communities have no such remedy, and further, as was heretofore stated, plaintiffs stand well to prevail on the merits of their complaint, so that, it is respectfully submitted, interlocutory relief should be granted in the instant case.

Conclusion

The rapid developments in this Court proceeding did not permit plaintiff communities the necessary time within which to file affidavits or other supporting data to further demonstrate irreparable injury to these municipalities if the merger is allowed to become effective pending full hearing on the merits. Moreover, irreparable injury embraced in the traffic forecasts is also clear from the merger proposal.

Too, industry looks to the availability and adequacy of railroad service prior to making a decision with respect to industrial locations or in the decision to reduce or expand existing facilities.

Contrary to the Commission's findings, the actual certainty is that approval of the merger endangers the economic welfare of the State of New Jersey, a highly industrialized state, as well as the plaintiff-communities wherein so many of the railroads converge and have their yards and terminals.

For the above stated reasons, this Court should issue an interlocutory injunction pending determination of this action upon the merits.

Respectfully submitted,

Howard Lionel Toft
Attorney for Intervening
Plaintiff-Municipalities

Of Counsel
Julius S. Christensen
150 Broadway
New York, New York
Dated: September 27, 1966

D

United States District Court

SOUTHERN DISTRICT OF NEW YORK

ERIE-LACKAWANNA RAILROAD COMPANY,
Plaintiff,
v.
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

66 Civ. 2860

BRIEF ON BEHALF OF MILTON J. SHAPP IN SUPPORT OF MOTIONS FOR ISSUANCE OF AN INTERLOCUTORY INJUNCTION.

By complaint dated September 12, 1966, as supplemented September 22, 1966, Milton J. Shapp seeks to permanently enjoin and set aside orders of the Interstate Commerce Commission entered April 6, 1966 and September 16, 1966 in its Finance Docket Nos. 21989 and 21990, *Pennsylvania R. Co.-Merger-New York Central R. Co.*

This brief is submitted in support of the issuance of an interlocutory injunction staying the operation of said orders of the Interstate Commerce Commission pending final hearing and determination of this action on the merits.

The railroad network in the Eastern District presently consists of four fairly balanced systems, i.e., N&W, NYC, C&O-B&O and PRR, plus a number of important independent lines such as E-L, D&H, B&M, RDG, CNJ and WM.[1]

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[1] N&W (Norfolk and Western Railway Company); NYC (New York Central Railroad Company); C&O-B&O (The Chesapeake and Ohio Railway Company-The Baltimore and Ohio Railroad Company); PRR (Pennsylvania Railroad Company); E-L (Erie-Lackawanna Railroad Company); D&H (The Delaware and Hudson Railroad Corporation); B&M (Boston and Maine Corporation); RDG9 Reading Company); CNJ (Central Railroad Company of New Jersey); WM (Western Maryland Railway Company).

Merger of PRR and NYC would give that single system approximately 50 percent of the revenues, and relegate the other two, N&W and C&O-B&O, to approximately 25 percent each of the combined revenues among the four systems. The prospect of a PRR-NYC merger has already set in motion two other major railroad unification proceedings at the Interstate Commerce Commission. These are: (1) Finance Docket No. 21510, *Norfolk & W. Ry. Co. and New York, C. & St. L. Ry. Co. Merger*, where E-L, D&H and B&M seek to be included in the N&W system as part of a proposed 3-system plan for the East which would be composed of N&W, PRR-NYC and C&O-B&O, and (2) Finance Docket No. 23832, *Norfolk & Western Railway Company-Merger—Chesapeake & Ohio Railway Company*, where N&W and C&O-B&O seek to merge into a single system to compete against PRR-NYC as part of a proposed 2-system plan for the Eastern District.

There is substantial opposition to both the 3-system plan and the 2-system plan, and there is absolutely no assurance that the major independent lines, such as E-L, B&H, B&M, RDG, CNJ or WM, will be included in any merger. The court is urged to keep in mind that the evidence submitted in F.D. 21510, and the application on file in F.D. 23832, show conclusively that those proceedings arise *solely because of the proposed PRR-NYC merger*.

It is the position of Milton J. Shapp that consummation of the PRR-NYC merger will seriously harm the future industrial development of most areas of Pennsylvania, and will greatly diminish any possibility of industrial redevelopment and increased employment in almost all areas of Pennsylvania. This is because the merger is based upon a reduction in capacity by filling out lightly loaded trains with the combined traffic of the two railroads, concentrating trains over certain tracks, and permitting steps to achieve a better utilization of capacity in a declining market for railroad transportation. The report of the Commission states its purpose in approving the merger is to trim the unnecessary plant, and equates its action in approving the merger with the pruning of a fruit tree. (327 I.C.C. 475, 496)

Contrary to the pessimistic views of the Commission and of its hearing examiners more, rather than less, railroad capacity is needed if the State of Pennsylvania, and the national economy, are to have the railroad capacity which is *essential* to future economic growth. The railroad industry is crucial because transportation capacity must precede economic development and absent necessary capacity, there can be no economic growth to meet our national economic goals and foreign policy commitments.

This brief in support of an interlocutory injunction is organized along the lines of *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (D.C. Cir., 1958) followed in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 261 F. 2d 830 (2d Cir., 1958), as suggested by this court.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

The relevant portions of the petition of Milton J. Shapp for reconsideration of the April 6, 1966 report of the Commission and for other relief, dated July 11, 1966, is attached to his supplemental complaint in this court, dated September 22, 1966, as Exhibit "A."

Exhibit "A" shows that it is highly likely that plaintiff will prevail on the merits in this action, and that the Commission's orders approving the merger will be permanently enjoined. The April 6, 1966 report is permeated with major errors of law, the most noteworthy of which are:

A. *Public Interest*. The report of the Commission is predicated upon the definition of "public interest" taken from the Transportation Act of 1920 as construed in *New York Central Securities Corp.* v. *United States*, 287 U.S.

12 (1932), followed in *United States* v. *Lowden*, 308 U.S. 225, 230 (1939), both decisions deriving from the opinion of Justice Brandeis in *New England Divisions Case*, 261 U.S. 184 (1923), which found that Congress in 1920 enacted a transportation policy. (327 I.C.C. 475, 494, 505)

The Commission in its September 16, 1966 report on reconsideration does not deal with the position advanced by Milton J. Shapp that the Transportation Act of 1940 brought about a new and more comprehensive transportation policy, known as the National Transportation Policy, which should be the guide to the construction of the "public interest" contained in section 5(2)(b) of the Interstate Commerce Act, in addition to post-1940 legislation affecting transportation. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80-87. Important legislation enacted subsequent to 1940 includes the Employment Act of 1946, Area Redevelopment Act of 1961, Manpower Development and Training Act of 1962, Economic Opportunity Act of 1964 and the Appalachian Regional Development Act of 1965. This subsequent legislation affecting transportation is important and decisive in this proceeding, because the hearing examiners have a lengthy section in their report entitled, "Effect on Specific Areas, States and Communities" where numerous and serious adverse consequences of the proposed merger are recited. However, based upon the law, this testimony is completely discounted. Thus, at sheet 281:

> "In arguing that the merger should be denied on these bases and requesting the specified condition be imposed on such grounds, we believe that these parties have failed to recognize the nature of the statutory limitations imposed upon the Commission's regulatory power."

> "Treated from a regulatory standpoint, and viewed in light of our basic authority as circumscribed by law,

we find no foundation to consider such arguments and proposals in determining whether the merger is or is not in the public interest.

And again, at sheet 282:

"The Interstate Commerce Commission, while having broad jurisdiction in the regulation of railroads generally, is confined by its statutory authority in considering 'the public interest' as it applies to the 'adequacy of a transportation service,' and it has no authority to guarantee a certain level of employment at a particular location not to gauge or consider the effect which disinvestment by railroads at a given point would have upon the taxing structure of particular states, counties, communities, or other political subdivisions."

"It is eminently clear that neither the taxing structure, the level of employment in a given area, nor other arguments running to these essential questions bear any relationship to transportation, nor can we find any provision of the act or in its legislative history that permits us to measure the impact of the proposed merger in relationship to such effects upon economic, political or geographic areas or individual businesses located therein."

And finally, at sheet 283:

"Insofar as this Commission is concerned, such effects, though nonetheless real, have no jurisdictional significance and, in our opinion, any condition whose purpose is to protect such interests cannot be imposed. On this basis, therefore, these arguments need not be considered further, and we so find.

The court is thus faced with a clear-cut legal issue. Are the hundreds of towns and cities opposing this merger to be totally ignored as a matter of law? If they are not to be ignored as a matter of law, then the decision of the

Interstate Commerce Commission approving the merger must be set aside.

Plaintiff Milton J. Shapp suggests that the "public interest" proviso of section 5(2)(b) as guided by the National Transportation Policy and subsequent legislation affecting transportation, dictates reversal of the Commission on this decisive issue. Moreover, section 5(2)(b) does not limit the Commission to the four specified criteria named therein.

B. *Analysis of Competition.* Although the Commission in its April 6, 1966 report states that an appraisal of the competitive aspects of the merger must be made (327 I.C.C. at p. 508), it rejects the *Brown Shoe*[2] analysis in favor of "transportation standards." (327 I.C.C. 475, 509) Milton J. Shapp, in his petition for reconsideration dated July 11, 1966, pointed out that if the relevant product and geographical market concept of *Brown Shoe* is rejected, then the report is defective in that it fails to employ the "transportation standards" traditionally used over the years to evaluate railroad competition by the Commission itself.

In its report on reconsideration of September 16, 1966, the Commission holds that its power to grant antitrust immunity relieves it of the obligation to measure competition by the traditional tests. (Report, 9/16/66, sheets 7-9) This attempt to avoid any standards, "transportation" or otherwise, runs afoul the teachings of the Supreme Court in *McLean* and *Minneapolis.*[3] The further answer of the Commission, that its regulatory power affords a continuous bar to any perversion of economic power gained by approval of the merger (Report, 9/16/66, sheets 9-10), ignores the wide zone of reasonableness in railroad ratemaking within which the Commission is powerless. *United States* v. *Chicago, M. St. P. & P.R. Co.*, 294 U.S. 499, 506 (1935); *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 460-61 (1945). The Reed-Bulwinkle amendment, known as section 5a of the Interstate Commerce Act, does not bar independent rate action by competing railroads as will merger of PRR and NYC. Indeed, it was the preservation of independent action within the zone of reasonableness that played a great part in the enactment of section 5a in 1948.

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[2] *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962)

[3] *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173 (1959)

The statement of the Commission that the public has recourse to the law against undue preference or discrimination or unreasonable treatment by carriers is a self-serving statement which ignores the judicial construction of sections 1(4), 1(5) and 3(1) of the Interstate Commerce Act. The reality of the situation is that the Commission has been granted limited powers by the Congress and, as could be confirmed by most industrial traffic managers who actually negotiate freight rates with their carriers, it is competition which brings results.[4]

The answer of the Commission to its failure to consider interlocking directorates and reciprocity is equally erroneous as a matter of law. (Report, 9/16/66, sheet 10) The issue is not whether the Commission must find a violation of the Clayton Act. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965) Rather, it is the adequacy of a report which declines to consider these anti-competitive matters in weighing the pros and cons of the merger, particularly when raised at every stage of the proceeding.

The reports and orders assailed herein are fatally defective as a matter of law in their failure to estimate the scope and appraise the extent by which competition would be curtailed.

C. *Traffic Prospects.* The gloomy financial prospects for PRR and NYC permeate the entire April 6, 1966 report of the Commission, the prior recommended report of the examiners, and are repeated in the subsequent September 16, 1966 report. (Report 9/16/66, sheets 7-8, 11)

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[4] A good analysis of the actual limitations of I.C.C. regulation has been made by a practitioner of long standing before that agency. Wiprud, Arne C., *Justice in Transportation* (Ziff-Davis, 1945)

The various reports are fundamentally wrong on this important issue. The Commission, in essence, adopted the projections of witness Ernest W. Williams, Professor of Transportation at Columbia University, and rejected those of Leon H. Keyserling, former chairman of the Council of Economic Advisors.

The September 16, 1966 report of the Commission on reconsideration expresses the continued concern for the future as does the earlier report. The prospects for the future are given important consideration as to the time of consummation. (Report, 9/16/66, sheets 11-13)

The future according to witness Williams calls for a decline in PRR and NYC freight traffic from 75.1 and 72.6 billion ton-miles in 1960 and 1961, respectively, to 69 billion in 1965 and a further reduction to 66 billion in the year 1970. On the other hand, witness Keyserling projected that the 75.1 and 72.6 billion ton-miles of traffic in 1960 and 1961, respectively, would rise to 89 billion in 1965 and to a higher 105 billion in 1970. The studies of both economists used the year 1961 as the last complete year available for statistical data.

The actual occurrence was that witness Keyserling's projection for 1965 was on target. Combined PRR-NYC traffic was 89.2 billion ton-miles, and not the 69 billion projected by witness Williams on behalf of applicants. The hearing examiners projected a drop to 64 billion four years from now in 1970, and the report of the Commission projects both 64 billion and 71 billion in its April 6, 1966 report. (327 I.C.C. 475, 559)

The Commission's prediction of economic disaster of such magnitude within the next four years is nothing short of disaster, and its findings will almost certainly be found unsupported by substantial evidence and without a rational basis by this court.

D. *Traffic Conditions of Appendix G.* The April 6, 1966 report of the Commission prescribes certain traffic protection for E-L, D&H and B&M until such time as their petitions for inclusion in F.D. 21510 are determined. (327 I.C.C. 475, 561-3) These conditions, known as the traffic conditions of Appendix G, are also supplemented by condition 9 of Appendix A, which permits the filing of petitions for inclusion in the instant merger if inclusion in F.D. 21510 is denied. (See: Report, 9/16/66, sheets 25-28, for modification of Appendix A.9)

The Commission in its report on reconsideration recites the contention of Milton J. Shapp that the traffic protective conditions constitute a rate-making cartel. The Commission answers that absent a contract or agreement among the carriers, it may impose any condition so long as it is just and reasonable under section 5(2)(b), and violation of any other section of the Interstate Commerce Act in the process, or any other legislation, would appear irrelevant. (Report, 9/16/66, sheets 33, 35)

The traffic conditions are the subject of further hearings. However, the public will be denied the benefit of independent action during this period since any freight rates, even though within the zone of reasonableness, will be suspended and ordered cancelled if the Commission determines that they will divert or tend to divert traffic from E-L, D&H and D&M. The Reed-Bulwinkle Amendment is a fairly recent expression of Congress as to the right of independent action. It is the contention of plaintiff in its petition for reconsideration that this right cannot be taken away from the public without a hearing and without notice to interested parties. (Supplemental complaint, Exhibit "A," pp. 21-24)

The Commission cannot waive the policies of the antitrust laws and other sections of the Act merely to protect carriers without first affording the public an opportunity to be heard. Imposition of the traffic cartel conditions of Appendix G must not be operative for a single moment. To do so is to breach the faith given Congress during the lengthy controversy concerning the Reed-Bulwinkle amendment.

Underlying the protective conditions for E-L, D&H and B&M is the implicit assumption that, upon a proper record, these carriers will be included in the N&W system, or failing that, in a merged PRR-NYC system. There is, however, substantial opposition to inclusion in N&W. Attached hereto as Appendix A is the pleading filed on behalf of Milton J. Shapp on September 19, 1966 which indicates that inclusion of E-L and D&H would have a substantial adverse impact upon the public interest, particularly in the Commonwealth of Pennsylvania. With respect to inclusion in a merged PRR-NYC, the monopoly situation that would be created in Trunk Line territory raises very serious problems. In short, there is no guaranty that E-L, D&H, and B&M will be included in either system. If the protected carriers do not find a home in either system, Appendix G and Appendix A.9 are obviously inadequate to cope with the problem which would then be faced.

E. *Other Errors of Substance.* The attention of the court is directed to the petition of Milton J. Shapp for reconsideration, dated July 11, 1966, the relevant portions of which are attached as Exhibit "A," to his supplemental complaint dated September 22, 1966, for a more complete statement of the serious errors of fact and law which are likely to result in his prevailing on the merits in this action.

II. INJURY TO PLAINTIFF.

The injury which will be suffered by Milton J. Shapp upon consummation of the merger is that of a member of the public who will be generally injured by the merger. Residents in the Commonwealth of Pennsylvania will be particularly injured for the reasons set forth in the petition for reconsideration, dated July 11, 1966, the relevant portions of which are attached as Exhibit "A" to his supplemental complaint dated September 22, 1966. In his capacity of a stockholder of the PRR, plaintiff is of the opinion that his interest will be better protected if PRR does not merge with NYC. Such was the testimony of economist Leon H. Keyserling, and plaintiff is in accord therewith from his own studies.

The strong showing that plaintiff will ultimately prevail in this action on the merits, of course, reduces the quantum of injury which need be shown. *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (D.C. Cir., 1958)

The injury which would be sustained upon consummation of the merger would be irreparable in that once merged, the act is irrevocable, particularly in the case of railroads where track and rolling stock are involved, and once adjustments in plant are made, there is no adequate remedy at law and effective judicial review would be foreclosed.

III. LACK OF HARM TO OTHER PARTIES.

There will be little or no harm to other parties by the issuance of an interlocutory injunction. Any conceivable injury would be far outweighed by substantial damage the various plaintiffs and to the unrepresented public.

A. *Loss of Savings to PRR and NYC.* The complaint of Milton J. Shapp, dated September 12, 1966, specifically alleges that the Commission (p. 5):

> "(o) erroneously and unsupported by substantial evidence, found that the Pennsylvania Railroad Company and New York Central Railroad Company have shown that their annual savings from the merger will exceed $80 million after about eight years."

And in Paragraph VII of plaintiff's complaint (p. 7):

> "(c) failed to reopen the proceedings and grant a further hearing for the purpose of introducing the speech of witness Stuart T. Saunders, Chairman of the Pennsylvania Railroad Company, and for rehearing,

based upon radically revised methods for operating the proposed merged company, and the availability of new merger studies as requested by the petition of Milton J. Shapp.

The attack of plaintiff against the alleged $80 million in operating savings is well-founded. The basis for the claimed savings upon merger are detailed in the recommended report of the hearing examiners. (Rec. Rep., p. 129-131; 131-143)

The fundamental theory of the savings is for a scale down of railroad capacity to conform with an expected lower level of traffic, thus achieving a higher rate of capacity utilization. There would be a net reduction of 6,154,948 freight train miles (p. 132); retirement and modification of freight yards through more efficient utilization (p. 134-5); reduction in the locomotive fleet by the elimination of 306 units and reduction in the expense of operating marine equipment at New York Harbor (p. 137); and consolidation of general and traffic expenses (p. 137-8). The examiners conclude (p. 140):

> "Continuously declining traffic levels over the past years have resulted in a reduction in plant for both applicants. Their application to merge is another step in that direction and one which applicants have shown will be fruitful of operating economies in the long run."

The 22 percent increase in freight traffic for PRR and NYC between 1961 and 1965 makes necessary a re-evaluation of the plan upon which savings were estimated in the record before the Commission. Instead of declining from 72.6 billion ton-miles in 1961 to 69 billion ton-miles in 1965, as estimated by applicants before the Commission, freight traffic rose from 72.6 billion ton-miles in 1961 to 89.2 billion ton-miles in 1965, as witness Keyserling had projected.

The fallacy of the estimated savings of record can be appreciated by reference to the relationship between freight train miles and traffic.' PRR ton-miles carried rose 19 percent from 42 billion in 1961 to 50 billion in 1964, yet freight train miles increased only 6.5 percent from 27.8 million in 1961 to 29.6 million in 1964. The slack in lightly-loaded trains was taken up by traffic growth, so that PRR was forced to run additional trains to handle the burgeoning business.

The reliability of the operating study with respect to savings was seriously challenged by witness J. J. Kilgallon of the Commission's own staff because the month selected for the study, October, 1961, was not deemed representative. The Commission, itself, rejected the month of October as representative for Eastern railroads in its decision in *Akron, C. & Y.R. Co.* v. *Atchison, T. & S.F. Ry. Co.*, 321 I.C.C. 17, 31 (1963)

Most important, Mr. Stuart T. Saunders, Chairman of PRR, announced major operational changes in the proposed merger at New Castle, Pa. on December 15, 1965, the text of which Milton J. Shapp sought to introduce as an exhibit and as grounds for rehearing. The essential features of this address may be found at pages 14-19 of Exhibit "A" to plaintiff's supplemental complaint dated September 22, 1966. It is submitted that this speech recognizes that traffic growth requires a revised operating plan.

Mr. Saunders now states in his affidavit before this court, dated September 7, 1966, at page 2:

> "Since the foregoing findings were made, detailed plans for consolidation of the two properties have been progressed, and it is my considered opinion that the ultimate savings will exceed $81 million per annum."

Plaintiff Milton J. Shapp suggests that the above statement does not obviate what otherwise appears to be a stale record before the Commission with respect to operating savings. The new studies should be brought out into the open. Plaintiff is without the information necessary to contest the affidavit of Mr. Saunders and cannot, therefore, say that the new detailed plans referred to by the affiant will not exceed $81 million per annum in the absence of further hearings before the Commission.

Finally, it should be pointed out that the Commission itself recognizes that conditions for the protection of E-L, D&H and B&M would deny PRR and NYC of some of the merger benefits. (327 I.C.C. 475, 532)

B. *New Haven Railroad.* Plaintiff is unable to discern how an interlocutory injunction would harm the New Haven or the states served by that carrier. Financial assistance to protect passenger service appears to be a matter for private negotiation in which the states are obviously receiving value. The 1958 amendment to Section 13 a of the Interstate Commerce Act establishes a Congressional policy with respect to passenger service. *Southern R. Co.* v. *North Carolina*, 376 U.S. 93 (1964). The New Haven handled 3 billion ton-miles in 1964 in contrast to 84 billion for PRR and NYC combined. The court is respectfully urged not to let the tail wag the dog.

IV. THE PUBLIC INTEREST.

The public interest would not be harmed by issuance of an interlocutory injunction. On the contrary, it would be promoted. This proposed merger is of major importance to the Nation. The present stature of the U.S. economy and our foreign commitments do not warrant a contraction of railroad facilities. The prospects of a PRR-NYC merger have already caused the institution of new unification proceedings and the U.S. Supreme Court has not yet ruled on key aspects of the railroad merger movement. (See: Shapiro, Martin: *The Warren Court and the Interstate Commerce Commission*, 18 Stanford L. Rev. 110, 111-12, 149-150 Nov. 1965).

Proper evaluation of this proposed great amalgamation of assets, railroad and otherwise, aggregating $6 billion, with severe repercussions to many interests, both before the court and the unrepresented public, require that there be a searching judicial inquiry of this merger prior to undertaking the momentous step of consummation.

CONCLUSION

For the foregoing reasons, the motions for an interlocutory injunction should be granted.

Respectfully submitted,

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BEFORE THE

Interstate Commerce Commission

Finance Docket No. 21989

PENNSYLVANIA RAILROAD COMPANY—MERGER—
NEW YORK CENTRAL RAILROAD COMPANY

Finance Docket No. 21990

PENNSYLVANIA RAILROAD COMPANY STOCK ISSUANCE

PETITION ON BEHALF OF MILTON J. SHAPP, A PHILADELPHIA BUSINESSMAN AND A CITIZEN OF THE COMMONWEALTH OF PENNSYLVANIA, FOR (1) RECONSIDERATION OF DENIAL OF PETITION TO REOPEN THE RECORD FOR THE PURPOSE OF RECEIVING NEWLY DISCOVERED EVIDENCE AND FOR REHEARING, (2) REHEARING, (3) FURTHER HEARING AND (4) RECONSIDERATION OF THE REPORT AND ORDER SERVED APRIL 27, 1966.

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

The Background for Disaster 2

The Reality of Impending Disaster 3

The Justification for Disaster 8

Southern New England 11

Protestant Milton J. Shapp 12

Form of this Petition 13

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION TO REOPEN THE RECORD FOR THE PURPOSE OF RECEIVING NEWLY DISCOVERED EVIDENCE AND FOR REHEARING, AND FOR FURTHER HEARING AND REHEARING 14

1. The New Castle Speech Requires the Record be Reopened and a Rehearing Granted 14

2. Competitive Aspects of Erie-Lackawanna, Delaware & Hudson, Boston & Main Inclusion in N&W System, and the Proposed Merger of the C&O and N&W Systems, Requires That the Official Notice Be Amended and A Further Hearing Granted 19

3. The Imposition of the Appendix "G" Conditions Requires A Further Hearing to Avoid An Illegal Rate-Fixing Scheme That Violates Section 5a Procedures 21

4. The Public Relations Activities of the Commission Itself Requires That A Rehearing Be Granted 24

PETITION FOR RECONSIDERATION OF REPORT AND ORDER.... 36

Page

1. The Commission Has Erroneously and Inconsistently Construed the Governing Statutory Standard for the "Public Interest" 36
    - The "Tuggle" Standards 37
    - The "Webb" Standards 40
    - The Correct Statutory Standards 41
    - Analysis of Competition 50
    - Other Antitrust Standards 52
    - Summary of Statutory Standards 54
2. The Report Fails to Make the Necessary Findings Required by Section 5(2)(c)(4) of the Interstate Commerce Act 55
3. The Report Errs in Not Imposing Protection for Affected Employees On Other Railroads 56
4. The Report Fails to Comply With the Requirements of the Administrative Procedure Act 57
5. The Report Errs in Its Fundamental Proposition That the PRR and NYC, Independently, Cannot Survive the Competition of the C&O-B&O and N&W-NKP Systems 60
6. The Report Errs in Its Financial Analysis of Applicants 64
    - A. Representative Years 65
    - B. Prospects for the Future 67
    - C. Recent Earnings 70
    - D. Profits on Rail Operations 71

Page
E. Rate of Return 72
F. "The Financial Community" 74
7. The Report Errs in Inferring Any Savings in Operating Expenses From the Merger 75
8. The Report Fails to Impose the Protection Necessary for the City of Erie, Pennsylvania 75
9. The Report Errs in Its Misleading Statements as to the Position of Various Parties 77
A. Pennsylvania Communities 77
B. Commonwealth of Pennsylvania 78
C. U. S. Department of Justice 78
10. The Report Errs in Evaluating the Adverse Impact of the Merger Upon the Commonwealth of Pennsylvania 80
11. The Report Errs in Requiring the Citizens and Businessmen of Pennsylvania to Subsidize Their Rivals in Southern New England 83
12. The Report Errs in Concluding the Merger Will Result In A Substantial Improvement In and A Substantial Increased Availability of Equipment for Shippers 88
13. The Report Errs in the Condition That Erie-Lackawanna and Delaware & Hudson May Petition for Inclusion in the Merger 90
CONCLUSION 93
CERTIFICATE OF SERVICE 93
APPENDIX A 94

TABLE OF CASES

Page

Akron, C & Y R Co. v. Atchison T & S E Ry. Co., 321 I.C.C. 17 (1963) 75

Arrow Transp. Co. v. Southern R. Co., 372 U. S. 658 (1963) 23

Atchison, T. & S. F. R. Co. v. United States, 284 U. S. 248 (1932) 19

Brown Shoe Co. v. United States, 370 U. S. 294 51

Burlington Truck Lines v. United States, 371 U. S. 156 (1962) 58

C&NW Ry. and CGW Ry.-Merger (F.D. 23388) 73

Chesapeake & O. Ry. Co.—Control—Baltimore & O. Ry. Co., 317 I.C.C. 261 .... 23, 40

Control of Central Pacific by Southern Pacific, 76 I.C.C. 508 (1932) 38

County of Marin v. United States, 356 U. S. 412 (1947) 38, 39

Directors of Wheeling & Lake Erie, 138 I.C.C. 648 52

Federal Trade Commission v. Cement Institute, 333 U. S. 683 (1948) 66

Florida v. United States, 28 U. S. 194 (1931) 60

Georgia v. Pennsylvania R. Co., 324 U. S. 439 (1945) 22

Gilbertville Trucking Co. v. United States, 371 U. S. 115 (1942) 24

Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F. 2d 461, 361 U. S. 896 (1959) 29

Great Northern Pacific & Burlington Lines, Inc.—Merger, Etc.—Great Northern Railway Company, Et al, F.D. 21478 .... 36, 37, 38, 40, 43, 44, 45, 50, 74, 89

Increased Freight Rates, 1951, 281 I.C.C. 557; 284 I.C.C. 689 73

Increased Freight Rates, E., W., and S. Territories, 1956, 300 I.C.C. 633 73

Increased Railway Rates, Fares, and Charges, 1946, 264 I.C.C. 695 73

International Shoe Co. v. Federal Trade Commission, 280 U. S. 291 (1930) 72

Interstate Commerce Commission v. Baltimore & O. R. Co., 152 I.C.C. 721 52

Interstate Commerce Commission v. Baltimore & O. R. Co., 160 I.C.C. 785 52

Page

I.C.C. v. New York, N.H. & H.R. Co., 372 U. S. 744 43

Maintenance Employees v. U. S., 366 U. S. 169 39

McLean Trucking Co. v. United States, 321 U. S. 67 (1944) ....
20, 24, 37, 38, 39, 40, 41, 43, 44, 45, 49, 50, 52, 53, 54, 86

Minneapolis & St. Louis R. Co. v. United States, 361 U. S. 173....50, 52, 53

New England Divisions Case, 261 U. S. 184 (1923) 41, 43, 44

New York Central R. Co. v. United States, 207 F. Supp. 483 77

New York Central Securities Corp. v. United States, 287 U. S. 12 (1932) 38, 41, 42, 43, 44, 50, 54, 82

Norfolk & W. Ry. Co. and New York, C. & St. L. Ry. Co. Merger, 324 I.C.C. 1 ....19, 30

Pacific Power & Light Co. v. Federal Power Commission, 111 F. (2d) 1014 (9th Cir., 1940) 39, 41

Panama Refining Co. v. Ryan, 293 U. S. 388 (1935) 60

Plastics from Texas to the East (I.&S. Docket No. 7344) 43

Railway Labor Executives' Assn. v. United States, 216 F. Supp. 101 (E.D. Va. 1963) 55

Reciprocity in Purchasing and Routing, 188 I.C.C. 417 53

St. Joe Paper Company v. Atlantic Coast Line Co., 347 U. S. 298 (1954) 38

Schwabacher v. United States, 334 U. S. 182 (1947) 38, 39

Seaboard Air Line R. Co. v. United States, 382 U. S. 154 (1965)..38, 40, 50

Sheppard V. Maxwell, 34 Law Week 4451 (1966) 34

Texaco, Inc. v. F.T.C. 336 F. 2d 754, 381 U. S. 739 (1965) 28

Texas v. United States, 292 U. S. 522 ....42, 44

United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499 (1935) 22, 59

United States v. Lowden, 308 U. S. 225 ....37, 40, 42, 43, 54, 80, 82

Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) 29

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PRELIMINARY STATEMENT

This petition is filed to save the third largest state from economic ruin. The proposed merger of the Pennsylvania Railroad Company with the New York Central Railroad Company is the single most serious threat to the economy of Pennsylvania today.

For reasons which cannot be supported in fact or in law, the Interstate Commerce Commission has placed its stamp of approval on the largest corporate merger in the history of our country—railroad or otherwise. This gargantuan merger proposal has already started a chain reaction among other railroads serving Pennsylvania to likewise merge and reduce their facilities and services. The Commission in this proceeding finds that the Erie-Lackawanna and Delaware & Hudson railroads which serve many communities in Pennsylvania cannot survive a PRR-NYC merger, so these two independent railroads now seek to be included in the Norfolk & Western Railway System. But the Norfolk & Western Railway along with the Chesapeake & Ohio and Baltimore & Ohio railroads also fear the impact of the PRR-NYC merger, so they too have now filed applications for merger to maintain competitive position in the East.

The proposed PRR-NYC merger would end the present balance between four major railroad systems serving eastern states. The present four systems, i.e., PRR, NYC, C&O-B&O and N&W, are each about equal in freight revenues. The proposed merger of PRR and NYC would upset this balance and give the one PRR-NYC twice the power over each of the two remaining competitive systems. The existing four systems are each principally oriented to different ports. The NYC provides basic service to the Port of New York; the PRR to Philadelphia; C&O-B&O is the protector of Baltimore; N&W promotes Norfolk. The proposed merger would disrupt this pattern by placing the welfare of New York and Philadelphia in the hands of one railroad with the obvious conflict-of-interest, and unfortunately the testimony of the railroads shows clearly the merger would be disadvantageous to Philadelphia.

The Background for Disaster

The PRR, by far the largest of the carriers that serve the Commonwealth, with its main line running from Philadelphia through Harrisburg and Pittsburgh to the Ohio State line, and thence westward to the gateway cities of Cincinnati, St. Louis, Peoria, Chicago and the Straits of Mackinac, has been the lifeline by which Pennsylvania has moved its products into distant markets for over a century. Towns thrive along railroads, sea lanes, and highways today, as they did along camel trails in the past. Where there is movement there are people and jobs. A reduction in movement means economic stagnation, unemployment and decay.

The NYC is the arch-competitor of the PRR and of the Pennsylvania businessman. The NYC main line runs north from New York City along the banks of the Hudson River to Albany, thence westward through the Mohawk Valley parallel to the Erie Canal, serving the New York State industrial complex of Schenectady, Utica, Syracuse, Rochester, Buffalo, thence onward west to the gateway cities of Cincinnati, St. Louis, Peoria, Chicago, and the Straits of Mackinac.

The water-level route of the NYC, coupled with the Erie Canal-Hudson River waterway system stretching from Lake Erie to New York Harbor, since the year 1825 has served to make New York City and New York State preeminent over Philadelphia and the State of Pennsylvania. On the other hand, prior to 1825, and the opening of the Erie Canal, Philadelphia was the leading metropolis of this Nation and, indeed, Philadelphia was the leading city of the United States because in those days New York City was relegated to second place with respect to commerce and population.

The PRR was organized in 1846 to meet the competitive challenge for the commerce of the west. Of the $12,000,000 capital needed to start the PRR, the City of Philadelphia itself subscribed over $5,000,000; the Borough of Spring Garden raised $50,000 and Allegheny County invested $1,000,000. All of this was a splendid example of government and private citizens joining forces to meet an economic challenge.

The problem facing the PRR and Pennsylvania, then as now, was the more severe gradients and curves necessary to cross Pennsylvania in comparison with the water-level route of the NYC across New York State. But with greater mineral resources and the development of the Ohio Valley river system up to Pittsburgh tying in with the PRR, Pennsylvania has been able to compete successfully with New York State and its chief railroad, the NYC.

The Reality of Impending Disaster

Merger of the PRR and NYC would combine $5.2 billion in railroad, real estate and industrial assets under the control of one management. The welfare of two heretofore competing cities and their ports—Philadelphia and New York City—would from a practical standpoint be placed under the domination of one railroad management. Two competing adjacent states—Pennsylvania and New York State—would be placed under the control of that same management.

The directors and officers of the merged PRR-NYC railroad, although not elected by the public, would hold more power over the future economic development of any city or state in the area served by this transportation leviathan than any elected official, be he congressman, senator, mayor or governor. These officials will determine what equipment will be purchased and from whom; the level of freight rates within the zone of reasonableness; and a myriad of other vital decisions without any state or federal supervision.

Railroad freight traffic now moving across Pennsylvania over the PRR is proposed to be diverted to the water-level route in New York State over the NYC. All through freight originating or terminating west of Columbus, Ohio and north and east of Linden, N. J. will be taken away from Pennsylvania and routed over the NYC tracks via Buffalo and Albany, N. Y.

The proposed PRR-NYC merger will involve a capital expenditure program of $74,696,000, but only $4,750,000, or less than 7 percent, would be spent in Pennsylvania, *and none of even this small sum would be spent to improve rail service in Pennsylvania.* About half of the proposed investment in Pennsylvania would be to enlarge repair facilities in the Commonwealth, and the other half to construct new switching facilities to transfer freight trains moving north of Pittsburgh out of Pennsylvania to Youngstown and Ashtabula, Ohio. This investment would work to the detriment of freight service for Pennsylvania communities. The new facilities projected by the merged company are shown on page 490 of the report. There is nothing listed for Pennsylvania. (327 I.C.C. 475, 490) A huge new yard is to be constructed on the NYC at Selkirk, N. Y., near Albany, to handle 5,000 freight cars per day, for classification of added traffic over NYC routes to New England and to the New York-New Jersey metropolitan areas.

The proposed merger would eliminate one-third of the PRR freight train miles. The zone maps of applicants themselves show that communities such as Altoona, Harrisburg, Lancaster, Johnstown, Oil City, Titusville, Sharon, New Castle, Williamsport and Pittsburgh would lose from 18 to 73 percent of daily through freight service as now provided by PRR.

Milton J. Shapp calculated from data submitted by PRR-NYC witnesses that the merger will cause Pennsylvania to suffer an initial loss of approximately 35% of its daily freight service. The ICC examiners calculate Pennsylvania's initial loss to be only 9%. (Rec. Rep., p. 259) But be it 9% or 35%, Pennsylvania today is suffering from a deficiency of modern transportation facilities and cannot afford any loss of service if it is to compete successfully in efforts to attract new industry.

The Port of Erie, the Commonwealth of Pennsylvania's only outlet on the Great Lakes will suffer irreparable injury, as will the intermediate towns on the PRR's two routes from Erie to Pittsburgh—one via Corry, and the other via Girard, Sharon and New Castle. The merged PRR-NYC will use the NYC's lake port of Ashtabula, Ohio as the main lake port for the commerce of the Pittsburgh region.

The Port of Philadelphia will suffer irreparable injury. The number of trains routed through Philadelphia or via the Thorndale-Morrisville cutoff will be reduced since traffic previously moving over PRR lines between points west of Columbus, on the one hand, and, on the other, points north of Linden, N. J., would be rerouted over the NYC's lines through New York State. The PRR-NYC has revealed they would concentrate traffic over the improved high speed water-level route of the NYC and thus prefer the Port of New York. With the expanded N&W system able to supply speedy service to the Port of Norfolk, the C&O-B&O to Baltimore, and the PRR-NYC to New York, the Port of Philadelphia, employing about 100,000 workers directly and accounting for an estimated additional 150,000 indirectly, will be caught in a giant squeeze that will eventually result in the loss of a substantial proportion of freight except bulk cargo such as coal, ore, grain and oil to and-from nearby plants.

The merged PRR-NYC and its subsidiary the Pittsburgh & Lake Erie would create a virtual monopoly of railroad traffic to and from the Pittsburgh Switching District, by controlling 70% of the freight originated and terminated at Pittsburgh. The remaining 30% is shared by the B&O, N&W and B & LE, the latter carrier being controlled by the U. S. Steel Corporation. The report of the Commission provides no substantial safeguard against this monopoly, other than to permit the B&O and N&W reciprocal switching rights if they, in turn, permit PRR-NYC to invade industries exclusively served by either B&O or N&W. The latter two carriers, however, have given no indication in their petitions for reconsideration or rehearing that the reciprocal switching arrangement is satisfactory. Even so, this would be an inadequate substitute for the present competition between PRR and NYC (P&LE) in the Pittsburgh Switching District. A balancing of *carrier* competition between railroads does not meet the reduction in *market* competition between carriers, since different steel mills are located on different railroads.

The collapse of the PRR facilities in Pennsylvania, together with new capital expenditures in adjacent states, will be a tremendous handicap for the State in its competition for new industry. The development of transportation must always precede economic growth. The report of the Commission states, "He (Shapp) *theorizes* transportation must precede economic growth . . ." (327 I.C.C. 475, 483) But this is not mere theory. Throughout all recorded history this has been axiomatic. Prebiblical villages along camel trails thrived to a greater degree than isolated villages. The Phoenicians built a viable economy, as did the Spanish and British later, by developing merchant shipping. The Union of South Africa enjoys a per capita income of at least ten times that of any other West Coast African nation because of the chance discovery of gold and diamonds 1,000 miles in its interior, and the construction then of a railroad across the nation to haul out these precious commodities. The railroad led to the development of the interior of South Africa.

There was no economic development of the Scranton-Wilkes-Barre area until first canals and then railroads enabled the fiery energy of anthracite coal to be made available to world markets. It is one of the indisputable facts of economics that until adequate transportation facilities are developed there can be little, if any, economic development of a state, nation or region. It is also axiomatic that unless a state, nation or region of the world maintains an adequate transportation system to haul its products and transport its people efficiently, its economy stagnates, then declines.

The lag in economic growth for Pennsylvania during the 20th century is directly attributable in large measure to lack of adequate transportation facilities. Pennsylvania must have more rather than less transportation. Yet the PRR-NYC merger would divert at least 2.5 million freight train miles from the Commonwealth.

Added to the reduction in railroad service, is the harsh fact that there are today only two commercial airports in the third largest state, Pennsylvania, which are equipped to handle large jet planes. Only two major river improvement programs have been undertaken this century in a state of great rivers.

The report of the Interstate Commerce Commission writes off the evidence and arguments of protestant Milton J. Shapp, and writes off the future development of the Commonwealth:

> "Furthermore, the proliferation of transportation facilities is conceived, in today's regulatory plan, as the result of present or foreseeable future requirements of the 'public convenience and necessity.' While carriers do promote the development of industry along their routes and in their service areas, it is not intended that private enterprise be required to establish transportation means or maintain service where a need does not exist, merely in the hope that, at some (indefinite) future time, business and industry will locate and grow along those established routes." (327 I.C.C. 475, 493)

The Commission has confused its standards under Sections 1(18)-(22) governing the "public convenience and necessity" requirements for the construction of new track or the abandonment of unneeded facilities with the standards under Section 5(2) governing railroad mergers. More important, and most discouraging, is the Commission's view that railroads do not have a public duty to assist industry in their service areas. If this view is correct, then nationalization or state ownership of the PRR would appear the only remedy. For once the railroad facilities are torn up, and the land devoted to other uses, the process is practically irreversible. Deprived of low cost rail service, an area degenerates into chronic economic stagnation, its municipalities become ghost towns, hope is abandoned, and destruction becomes as complete as that visited upon ancient Carthage.

The PRR as a utility has a franchise. The railroad must either promote the public interest or lose that franchise. The negative attitude of the Interstate Commerce Commission—if followed upon reconsideration or if adopted by federal courts—can perhaps result in nationalization. Protestant Milton J. Shapp believes strongly that there is a glowing future for imaginative private enterprise and ownership of the railroads. It is in the self-interest of the business community that private enterprise, rather than government, bear the responsibility for "the public interest." For otherwise the public will turn upon private enterprise—as has happened to the railroad system in most other countries.

The Justification for Disaster

The proposed PRR-NYC merger is conceded by applicants to violate the antitrust laws—the basic charter of economic liberty in our society—but applicants nevertheless ask the Commission to grant them immunity from the laws.

The reason given by the Commission in approving the merger is:

> ". . . to open the way for the development of a modernized railroad system *trimmed* of *unnecessary* plant, unencumbered by service obligations no longer responsive to the public needs . . ."
>
> "Mergers are not for shrinkage any more than the pruning of a fruit tree is for reducing the yield of fruit." (327 I.C.C. 475, 496)

But the Commission does not wish to prune the fruit trees growing in southern New England, for the New Haven Railroad must be saved:

> ". . . we find that this merger, without complete inclusion of NH, would not be consistent with the public interest, and accordingly, we will require *all* the New Haven railroad to be included in the applicants' transaction." (327 I.C.C. 475, 524)
>
> ". . . and our approval of the merger is conditioned upon such inclusion." (327 I.C.C. 475, 527)

Counsel for PRR-NYC put his case more defiantly for a reduction in railroad competition during oral argument:

> "The excessive and debilitating competition that exists in the east has got to be corrected and it will be corrected. It will either be done orderly through the methods we are proposing in this merger, or it is going to be done by the no holds barred laws of economics, but corrected it will, it will be corrected." (Tr. 19, 794)

The approval of this merger by the Commission is predicated upon economic disaster. The drastic curtailment of railroad facilities and service by the merger of the PRR and NYC, two parallel lines, will create the very disaster that the Commission anticipates.

The merger application was filed in early March, 1962. The plan for operating the merged system was based upon October, 1961. The last complete year for statistics was the year 1961. The basic case for the applicants in justification for their merger, with the attendant crippling of Pennsylvania's future economic growth, was based upon studies purporting to show an economic collapse for the PRR and for the NYC. Lightly loaded trains would be filled out by combining the traffic of the two railroads, trains concentrated over certain tracks, and other steps taken to achieve a better utilization of capacity in a declining market for railroad transportation.

The trimming of the unnecessary vines of the fruit tree was to be justified by a decline from 72.6 billion ton-miles on the PRR-NYC in 1961 to 68 billion ton-miles in 1965 and to 66 billion ton-miles in 1970.

The hearing examiners thought even this drop to be a bit optimistic; they projected the 66 billion in 1970 down to a lower 64 billion ton-miles in 1970.

The entire case urged for the merger, and the purpose of the Commission in approving the merger, has vanished into thin air. Instead of collapsing from 72.6 billion ton-miles in 1961 to 68 billion ton-miles in 1965, the combined traffic of the PRR-NYC rose 22% in the four year period to 89.2 billion ton-miles in 1965.

The PRR enjoyed another increase in traffic during the first quarter of 1966. The *Wall Street Journal* reported in its issue of April 25, 1966, quoting Chairman Saunders from Philadelphia, that freight revenues climbed 3.9% in the first quarter over the previous year and that net ton miles increased 3.3% from the similar period in 1965.

Rather than pruning the fruit tree of railroad facilities, there is presently a tremendous shortage of railroad equipment for moving freight. Milton J. Shapp maintains that the merger must be disapproved as the entire justification for the merger has vanished. The problem today is not one of reducing capacity to conform with fewer carloadings, but to increase capacity to cope with increasing business.

Witness Leon J. Keyserling, former Chairman of the Council of Economic Advisors, testified in this case that applicants' traffic would rise to 89 billion ton-miles in 1965. He has been proven right and the Commission has been proven wrong. Witness Keyserling has testified in this case that the traffic will continue to rise to 105 billion ton-miles in 1970, whereas the Commission continues to project an economic disaster with a now-revised figure of 71 billion ton-miles for 1970.

It is essential for the economy of Pennsylvania that this merger be disapproved. The PRR and NYC must not be permitted to budget their facilities downward from 89 billion ton-miles in 1965 to 71 billion ton-miles 4 years from now. To permit this merger will mean that the economy of Pennsylvania will be locked into a downward spiral—patterned upon the profit motivation of the PRR rather than the needs of the Commonwealth.

Southern New England

Only the railroad plant west of the Hudson River is to be torn up. The New Haven is to be saved. But why must Pennsylvania suffer for New England? The Commission gives no rational explanation.

The New Haven Railroad and the Boston & Maine Railroad occupy a position comparable to southern New England as the PRR and NYC do for Trunk Line territory. The main line of the NH runs from Boston along a southerly route to the Hudson River crossings at New York City and Maybrook, N. J., whereas the main line of the B&M runs north and westerly from Boston across Massachusetts to gateways at Mechanicville and Rotterdam Junction, N. Y. As a railroad map of southern New England indicates, both railroads have a multitude of secondary and branch lines criss-crossing this very small area of the country.

The PRR and NYC, as previously indicated, operate in a similar manner in trunk line territory. Both serve New York, N. Y. on the east, the PRR running southerly through Philadelphia to Pittsburgh, while the NYC operates over a northerly route to Buffalo.

The solution for the New England railroads recommended over the years by such transportation scholars as William Z. Ripley has been for a merger of the short New England railroads into a single system. In this manner the opportunity for the elimination of any excess capacity could be realized while, at the same time, the New England shipper could retain the benefit of railroad competition at the gateways because the New England carriers would not be merged with any trunk line railroad. On a New London, Conn. shipment to Chicago, Ill., the alternatives west of New York or Maybrook could be either NYC, PRR or E-L direct, or various multiple line routes with other carriers over Pittsburgh or Buffalo such as LV-N&W or CNJ-RDG-WM-N&W. In addition, the westbound Canadian differential routes with the CV, Grand Trunk, or CPR would be preserved.

But inclusion of the NH in the PRR-NYC merger, indeed the NH inclusion being a major justification for the merger, means that the NH and B&M will be affiliated with major trunk line systems. The New England shipper will lose his competitive routes such as the New London-Chicago movement which will be single-line over the merged PRR-NYC system. On the other hand, existing railroad capacity in New England will be preserved because the B&M and NH will be affiliated with different trunk line systems.

The price for this preservation of rail plant capacity in southern New England is the PRR-NYC merger with *a destruction of both railroad capacity and railroad competition in the Commonwealth of Pennsylvania.* The southern New England interests have no right, in law or in equity, to insist that Pennsylvania tear up its railroad capacity so that Massachusetts, Connecticut and Rhode Island can maintain their railroad capacity intact. The notion that there should be *one* major carrier in trunk line territory (PRR-NYC) so that New England can have *two,* is contrary to the economic facts of life.

Pennsylvania is in no position to subsidize New England. The Commission, in approving the PRR-NYC merger, is going directly against the Appalachian Regional Development Act of 1965. The PRR-NYC moved 84 billion ton-miles in 1964, whereas the NH only handled 3 billion ton-miles. Pennsylvania supplies its railroads with heavy tonnage freight, such as coal, steel, and iron ore, whereas New England rail traffic is predominately inbound foodstuffs.

The proposed merger of the PRR-NYC is the greatest disaster facing the Commonwealth of Pennsylvania since the opening of the Erie Canal in 1825.

Protestant Milton J. Shapp

Milton J. Shapp is a Philadelphia businessman. He was an early opponent of the proposed merger with newspaper advertisements against the merger in September, 1962, and he testified at the Philadelphia hearing on January 16, 1963. He submitted an extensive prepared statement and detailed exhibit and was cross-examined by opposing counsel. (S-96; H-104; Tr. 8162-8217) He was recalled for further cross-examination on April 24, 1963 in Washington, D. C. (Tr. 13,669-13,700)

Milton J. Shapp filed exceptions and reply to exceptions against the examiners report in July and August, 1965.

Protestant has for many years been a student of transportation and other economic problems. He concludes:

> "I feel quite convinced that if this merger goes through as presently proposed, you can write off the future industrial development of most areas of Pennsylvania." (Tr. 8167)
>
> "This proposed merger will destroy any possibility of industrial redevelopment and increased employment in almost all areas of our hard-hit state. I can see no advantage to any community or industry in the State resulting from this merger, including the railroad industry itself." S-96, p. 3)

Milton J. Shapp is not alone in his opposition to the merger as proposed. Many Pennsylvania communities have intervened to oppose this merger. The Commonwealth of Pennsylvania objects to the merger unless certain safeguards are imposed—and the Commission thus far has granted none of the requested conditions. The U. S. Department of Justice has stated its opposition to the merger. The important railroads serving Pennsylvania, other than the PRR and NYC, have voiced their dissatisfaction with the Commission's report. These railroads include the Baltimore & Ohio, Norfolk & Western, Reading, Erie-Lackawanna and Delaware & Hudson.

FORM OF THIS PETITION

This petition is divided into two parts. The first is a request that the Commission reconsider its denial of the petition filed by protestant on January 3, 1966 which seeks to reopen the record for the purpose of receiving newly discovered evidence and for rehearing; further hearing and rehearing are also requested on additional new grounds.

The second portion of the petition seeks to have the Commission reconsider its action approving the merger, and upon reconsideration find that the merger will not be consistent with the public interest. This portion of the combined pleading sets forth numerous errors of law and fact in the report of the Commission.

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION TO REOPEN THE RECORD FOR THE PURPOSE OF RECEIVING NEWLY DISCOVERED EVIDENCE AND FOR REHEARING, AND FOR FURTHER HEARING AND REHEARING.

1. The New Castle Speech Requires the Record Be Reopened and a Rehearing Granted.

The report of the Commission contains a considerable amount of detail relating to the petition of Milton J. Shapp, filed January 3, 1966, which seeks to reopen the record for the purpose of introducing newly discovered evidence and for rehearing. (327 I.C.C. 475, 484-6)

The evidence is an address given by Mr. Stuart T. Saunders, Chairman of the Pennsylvania Railroad Company and a witness in this proceeding. The address was presented by Mr. Saunders to the Mayor and Councilmen of the City of New Castle, Pennsylvania on December 15, 1965. This speech describes a radically different method for operating the proposed merged company from that previously testified to by PRR and NYC witnesses. Petitioner seeks introduction of this address into evidence and a further hearing so as to introduce the new studies referred to by witness Saunders which are available. These studies supersede the evidence previously introduced by PRR and NYC witnesses. The present record in this proceeding is predicated upon outdated traffic and operating conditions for the month of October, 1961.

The recommended report of the hearing examiners stated:

> "The construction of a yard at Selkirk is in the examiners' opinion the single most significant change in terminal operations and, in essence, *is the key to the merger program.* (emphasis supplied) (Rec. Rep., p. 122)
>
> "The proposed method of rerouting of traffic after merger is predicated essentially on the general foundation that all east-west traffic between points west of Columbus and Youngstown, Ohio, on the one hand, and, on the other, points north of Linden, N. J., including points in New England, Northern New Jersey and Metropolitan New York, would be moved over to the so-called water-level

route of the NYC via Cleveland, Buffalo and Albany, and that traffic moving east-west between western points and those south of Linden would be rerouted over the PRR routes via Pittsburgh and Harrisburg."

There has been a tremendous growth of business on the PRR and NYC since termination of the 1960-61 economic recession. Witness Saunders stated in New Castle:

> "Now, this talk, he says we are going to take all the business west of Columbus and send it all up to Buffalo and then down to Selkirk, into New England and New York. *That's not true either.*" (emphasis supplied) (Shapp Pet. App. A, pp. 15-16)

Chairman Saunders in his New Castle speech gave a number of reasons for the *asserted change in traffic and* operating pattern for the merged system which will now retain business for the PRR route across Pennsylvania rather than diversion to the water-level NYC route across New York State:

1. The shippers control the routing of freight, so that the merged system could not route the traffic over the water-level route.*

2. The NYC does not have the capacity to handle the traffic and the NYC has reduced the number of its tracks.

3. The distance over the PRR routes is shorter than over NYC routes, and this shorter distance more than compensates for the heavier grades on the PRR.

4. The motive power of locomotives is much greater today than when the 1961 studies were made. That which we were considering in 1961 is largely changed by virtue of technological developments in motive power since that time, so that the railroad grades in the State of Pennsylvania are not as severe today.

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*This is wholly erroneous. The shipper does not have the right to specify internal routing over different lines of a single railroad. See: Shinn, G. L., *Freight Rate Application* (Simmons-Boardman, 1948), pp. 48-49; *Quality Gas & Oil Co.* v. *Northern Pac. Ry. Co.*, 185 I.C.C. 395, 398; *Interstate Fruit Co.* v. *Chicago, M. St. P. & P.R. Co.*, 195 I.C.C. 563, 565-6.

5. The business interchanged with the New Haven Railroad at New York is not of any great consequence so that loss of this traffic would not affect New Castle or western Pennsylvania.

6. A million tons of ore, chrome and manganese moves today through the Port of Baltimore via WM-P&LE or WM-P&W. Va. to points served by the NYC, which gives the NYC its long haul. Upon merger, this traffic will move through the Port of Philadelphia via PRR-NYC to points on the NYC.†

7. Fifteen million bushels of grain moves from the NYC through the Port of Baltimore via NYC-P&LE-WM which gives NYC the long haul. Upon merger the business will be NYC-PRR to the Port of Philadelphia.†

8. The PRR expects to move a minimum of 5,000,000 tons of central and western Pennsylvania coal to Europe in less than 5 years, and is willing to commit $50,000,000 to the project if necessary.

It is an error for the Commission not to reopen the record upon the above statements of witness Saunders, and protestant Milton J. Shapp requests the Commission to reconsider its ruling that good cause for reopening has not been shown. (327 I.C.C. 475, 486)

Applicants have not contested any of the facts stated by witness Saunders at New Castle, Pennsylvania on December 15, 1965. Rather, they take the position, as stated in their reply filed January 10, 1966, that the changed plans announced by witness Saunders and the undisclosed special operating and traffic studies are within the contemplation of normal changes described by the examiners in their report (citing specifically the full paragraph on page 114 of the recommended report).

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†Although not of record, it appears that Pennsylvania may not enjoy the promised movement of grain and chromium ore. Attached as Appendix A herein is the statement of Theodore R. McKeldin, Mayor of Baltimore, issued January 10, 1966. The present confusion and contradictory statements concerning such a large block of traffic, in itself, requires a further hearing.

The petition of Milton J. Shapp for further hearing must thus be taken as if all of the statements of witness Saunders are true and correct. Apart from the technical rules of pleadings, however, other sources corroborate the existence of new plans for the operation of the merged company. The *Wall Street Journal* carried a front page feature article relating to the changed plans on April 28, 1966; the article was published the day after the release of the report of the Commission in this proceeding on April 27, 1966. Written by reporter John D. Williams, a railroad specialist with the *Wall Street Journal,* the article states that new studies commenced in January, 1963, at a two day session in the Hilton Inn at Tarrytown, N. Y. attended by 80 top officers and key personnel. In a special office across the street from New York's Penn Station, 56 staffers have worked daily since last summer amid piles of maps and timetables to lay out an "operating plan." They are trying to decide which routes should be used and how traffic schedules should be altered, among other things.

Another source tending to corroborate the existence of at least the "two full books," referred to by witness Saunders at New Castle (Shapp pet., App. A, p. 14), is an article in the May 16, 1966 issue of *Railway Age,* page 11, in which Mr. A. J. Greenough, President of the PRR, confirmed that 70 officers of PRR and NYC have been working full time on the merger planning.*

The Commission recites, at length, for two pages, portions of the New Castle speech which are consistent with previous PRR testimony (327 I.C.C. 475, 484-5). Completely omitted are the crucial remarks of witness Saunders bearing upon the changed plan of operation whereby traffic moving to and from points west of Columbus, Ohio and the New England and New York areas will now not be routed over the water-level NYC route via Selkirk yard at Albany, N. Y. (Shapp pet., App. A, pp. 15-16). This changed plan is fundamental to the entire justification for the merger. Indeed, without it, the

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*See article to same effect in *New York Times* issue of May 10, 1966, *"70 Executives Work on Pennsy Merger,"* by Robert E. Bedingfield.

entire estimated improvement in freight schedules by the Commission and the estimated operating cost savings of the hearing examiners virtually vanish into thin air.

The Commission does not mention the fundamental revision in operating procedure raised by witness Saunders at New Castle. The report of the Commission evades the real impact of this newly discovered evidence by stating that such evidence would counter Shapp's arguments that the merger would be disastrous to Pennsylvania. Thus, at 327 I.C.C. 475, 485:

> "To the extent it tends to counter Shapp's arguments that the merger would be disastrous to Pennsylvania, its admission in evidence would be to his disadvantage."

The Commission has completely missed the point. It is of no consequence which party raises an embarrassing issue to the applicants. The hard fact is that the Chairman of the Pennsylvania Railroad Company announced a major revision in the operating plan for the merged system; and that this plan undercuts and destroys the primary underpinning for any operational efficiencies; and that applicants have not repudiated witness Saunders.

It follows that the merger is nothing other than a sheer monopolization device by the revocation of the 1961 operational plan previously presented by witness Patchell. Accordingly, it is grossly erroneous and misleading to say that the admission of the newly discovered evidence would be counter to Shapp's position, for the merger must necessarily be denied if it is only a monopolization scheme. There is inherent competition between the Ports of New York and Philadelphia for export, import and coastwise cargo. There is inherent competition between businesses located in both states for markets throughout the United States. A merger of the principal railroads serving each state, the NYC for New York State and the PRR for the State of Pennsylvania, would place the merged system in a gigantic conflict-of-interest situation. The fact that the PRR may no longer desire to divert traffic to the water-level route makes the merger proposal completely unjustified and wholly contrary to the public interest.

The change in the economy since 1961 and the dramatic increase in business for the PRR and NYC, when coupled with the complete alteration of operating plans described at New Castle and the admitted availability of detailed new studies, renders any denial of a further hearing an abuse of discretion by the Interstate Commerce Commission within the meaning of *Atchison, T. & S. F. R. Co.* v. *United States*, 284 U. S. 248 (1932).

2. Competitive Aspects of Erie-Lackawanna, Delaware & Hudson, Boston & Maine Inclusion in N&W System, and the Proposed Merger of the C&O and N&W Systems, Requires That the Official Notice Be Amended and a Further Hearing Granted.

The report of the Commission contains a section entitled "Recent Events Affecting Transactions." (327 I.C.C. 475, 487-489) The Commission takes official notice of the pending petitions of E-L, D&H, and B&M for inclusion in the N&W pursuant to Appendix O of *Norfolk & W. Ry. Co. and New York, C. & St. L. Ry. Co. Merger*, 324 I.C.C. 1, 148. The Commission also takes official notice of the application of the N&W and C&O for authority to merge in F.D. Nos. 23832 and 23833. The Commission invites any party challenging the facts set forth therewith to proceed pursuant to Section 7(d) of the Administrative Procedure Act. (327 I.C.C. 475, 487)

Milton J. Shapp hereby requests a further hearing in accordance with Section 7(d) of the APA and reopening of the record to demonstrate that the official notice given the N&W inclusion proceeding and the N&W-C&O application case does not give a correct appraisal, standing alone, of the true factual situation.

The official notice should be amended to show that the petitions for inclusion in N&W, and the testimony thus far presented in the reopened proceeding, show conclusively that the reason for the requested inclusion is the competitive threat of the proposed PRR-NYC merger; the official notice of the N&W-C&O application should show that the reason for that proposed merger is also the competitive threat of the same proposed PRR-NYC merger.

The above amendments are important because, having taken official notice of these two proceedings, the Commission is now required to evaluate the further anti-competitive effects of the PRR-NYC merger. The possible inclusion of the E-L, D&H and B&M in the N&W would reduce competition, and there is no evaluation of this reduction in competition in the instant proceeding. There is likewise no evaluation of the reduction in competition by a N&W-C&O merger, yet this possibility is also a direct creature of the proposed PRR-NYC merger.

The Commission is required to consider the results naturally or probably flowing from its decision in this proceeding. Although the Commission takes official notice of both the N&W inclusion case and the N&W-C&O merger, it fails to state that both cases are a direct result of this proceeding. The Commission should officially notice the primary instigation for both cases and reopen this proceeding for further evidence on the anti-competitive effects which these two proposals will have. The Commission must make an appraisal of the curtailment of competition directly resulting from the proposed consolidation and consider it along with other elements to determine whether the consolidation will assist in effectuating the overall transportation policy. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87 (1944).

There is a further reason for amending the official notice so as to present the motivating factors behind both cases. The concurring expression of Commissioner Tucker states that approval of one merger often leads to approval of another, on a case by case basis, without the Commission having a picture of the entire structure. (327 I.C.C. 475, 549) Therefore, the Commission should officially notice the motivation for the petitions for inclusion in N&W and the basis for the N&W-C&O merger application, and consider these factors in the determination of the PRR-NYC merger proceeding, as required by the Supreme Court in *McLean,* supra.

There can be no dispute as to the relevancy of the reopened *N&W* proceeding and the *N&W-C&O* merger case to the disposition of the PRR-NYC merger proceeding, because the Commission expressly states that these two other cases have a bearing upon its decision in this case. (327 I.C.C. 475, 487)

3. The Imposition of the Appendix "G" Conditions Requires a Further Hearing to Avoid an Illegal Rate-Fixing Scheme That Violates Section 5a Procedures.

Appendix "G" to the Commission's report prescribes certain novel conditions for the protection of the Erie-Lackawanna, Delaware & Hudson, and Boston & Maine railroads.

The petition of Norfolk & Western Railway Company, filed June 13, 1966, correctly points out that the indemnification provisions of Appendix G (paragraph No. 3) constitutes an illegal pooling device prohibited by Section 5(1) of the Interstate Commerce Act, and that the Commission is wholly lacking in authority to ignore the express requirements of Section 5(1) under the guise of imposing conditions in a Section 5(2) merger proceeding. (N&W petition, pp. 22-24)

The remaining implementing paragraphs of Appendix G (Nos. 1, 4, 5, 6 and 8) also violate the Interstate Commerce Act and the antitrust laws, and are an attempt to cartelize rate-making throughout Official territory without following the procedures and safeguards of Section 5a of the Interstate Commerce Act. The rate fixing scheme of Appendix G is diametrically contrary to the public interest.

Appendix G provides that the merged PRR-NYC shall not publish or provide for any new or changed routing practice and/or freight rates, either locally or jointly with other carriers, which *would divert* or *tend to divert* traffic from routes in which E-L, D&H or B&M participate as "competitive factors." (App. G. 1) The term "competitive factors" is construed to mean actual traffic participated in by E-L, D&H or B&M. (App. G. 2) As thus defined, E-L, D&H and B&M are protected from both carrier competition and market competition resulting from new or changed PRR-NYC tariffs.

The procedure set forth in Appendix G allows E-L, D&H and B&M to petition the Board of Suspension. If the Board determines that E-L, D&H or B&M are "competitive factors," suspension of the PRR-NYC traffic is mandatory. The suspension period is not the seven-month period provided in Section 15(7). Rather, the tariffs are to be suspended until such time as it is finally determined whether E-L, D&H or B&M are to be included in the N&W system, which may be many years in the future.

The Board is thence to investigate whether there is a violation of the traffic protective conditions, and if the protective conditions are found to be violated, cancellation of the tariffs is to be ordered. Similar powers are given the Board in complaints by E-L, D&H, or B&M where the investigation is instituted after the schedules have become effective. Appeals from the Board's action shall lie with Division 2.

The above provisions may not lawfully be prescribed in a Section 5(2) proceeding.

The right of independent action is a firm Congressional policy. It is expressed in Section 5a, which was enacted as part of the 1948 Reed-Bulwinkle Amendment to the Interstate Commerce Act.

There is a zone of reasonableness in rate-making. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506 (1935); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 460-1 (1945). The shipping public has the right to competitive rates within the zone of reasonableness. This right will be taken from the public if Appendix G is permitted to become operative. Rates which are otherwise just and reasonable within the meaning of Section 1(5) and 15(7) will be condemned on the sole ground of tending to divert traffic from the lines of E-L, D&H and B&M.

There has been no notice of these conditions given to the public. Yet Section 5a(8) contemplates that interested parties will be afforded reasonable opportunity for hearing. Section 5a applications are published in the *Federal Register* so that the public has notice of anti-competitive rate-making proposals and an opportunity for protest. The National Industrial Traffic League, and other shipper organizations, regularly appear at Section 5a hearings.

The Interstate Commerce Commission is without power to suspend proposed rates for a period greater than seven months. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963).

Imposition of the Appendix "G" rate-making conditions requires a separate hearing after advance publication in the *Federal Register*. The Commission, when asked to prescribe rate-making conditions in the *C&O-B&O* control case, stated that it was not a matter which should be considered in the proceeding, *Chesapeake & O. Ry. Co.—Control—Baltimore & O. Ry. Co.*, 317 I.C.C. 261, 289-290.

The evils inherent in Appendix "G" are readily apparent. The E-L, D&H and B&M will have a virtual veto power over most rate adjustments within official territory, and between official territory and other rate territories.

One example of potential harm to Pennsylvania can be gleaned from the New Castle speech of witness Saunders, where a prospective movement of from 5 to 10 million tons of coal from central and western Pennsylvania mines to European markets is anticipated. This coal would move over the PRR for export. Witness Saunders stated that 30 million tons of coal move into Europe today off the Norfolk & Western and off the C&O. (Shapp pet., App. A, pp. 19-20) The E-L and D&H, however, have the power to block reduced rates made to move Pennsylvania coal overseas if they presently participate in any export coal traffic with the N&W or C&O which might be lost by virtue of PRR promotion of mines located on its own system.

The potential commerce which may be stifled by Appendix "G" is staggering. Competing steel mills are located on the E-L and on the PRR-NYC. Inbound iron ore, coal, manganese, etc. will be affected as well as outbound steel products. Paper mills, fertilizer plants, chemical factories will all come under the rate fixing provisions of Appendix "G".

Appendix "G" permits an agreement by the parties to be substituted for the prescribed conditions in favor of E-L, D&H and B&M. Such an agreement is specifically authorized in paragraph 6 of Appendix "G", "to the extent the agreement does not violate the provisions of the Interstate Commerce Act or the Commission's rules and regulations thereunder." This carte blanche authorization, in advance, of any anti-competitive rate fixing agreement between the carriers cannot be countenanced. The Commission is not empowered to revise the requirements of Section 5a procedures for approving carrier agreements by resort to the imposition of wide-open conditions in a Section 5(2) proceeding.

Furthermore, the Commission is required to weigh the anti-competitive aspects of a proposed merger together with other criteria specified in Section 5(2) (c) and encompassed by the National Transportation Policy. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. The Commission has not performed this essential task because it has merely considered Appendix "G" as a protective device for the E-L, D&H and B&M, and not as one of the anti-competitive elements to be considered in passing upon the merger as a whole. This error requires a further hearing with notice to the public and publication in the *Federal Register*. The imposition of Appendix "G" is squarely contrary to *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115 (1942) and other cases cited in the petitions of N&W (6/13/66) and C&O-B&O (6/16/66). In addition to the further hearing requested by the N&W, C&O and B&O, the Reading Company recently announced that it will be hurt by Appendix "G" (N. Y. Times, July 5, 1966)

PETITION FOR RECONSIDERATION OF REPORT AND ORDER

The report of the Commission in this proceeding contains numerous and serious errors which the Commission should carefully reconsider before finally ruling upon the transaction. Proper consideration of these errors requires that the Commission henceforth disapprove the merger. Such a disapproval will leave the Eastern District with four balanced major systems and viable independent railroads.

The major errors of the Commission, demanding reconsideration, are as follows:

1. The Commission Has Erroneously and Inconsistently Construed the Governing Statutory Standard for the "Public Interest."

The applicable law governing the Commission's action is crucial in this mammoth merger proceeding, for the entire decision must be set aside if the Commission has used improper standards in testing the lawfulness of the merger application. It is the position of Milton J. Shapp that the report of April 6, 1966 in this proceeding is erroneous as a matter of law in that the fundamental and basic premise stated therein as to the Commission's duty under the Interstate Commerce Act and relevant related statutes is contrary to law.

The confusion is most apparent by comparing the statutory standards set forth in this proceeding with those propounded in F.D. 21478, *Great Northern Pacific & Burlington Lines, Inc.—Merger, Etc.—Great Northern Railway Company, Et al* (hereinafter *Northern Lines* case). *The PRR-NYC* and *Northern Lines* cases were released simultaneously by the Commission and were covered by the same press releases; *the PRR-NYC decision refers to the *Northern Lines* decision (327 I.C.C. 475, 505, 511) and the dissent of Commissioner Walrath in *Northern Lines* in turn refers to the PRR-NYC decision (sheets 121, 130, 132). The author of the majority opinion in

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***Nos. 51-66 and 56-66.**

PRR-NYC, Commissioner Tuggle, who serves as Chairman of the Finance Division, has a separate dissent in *Northern Lines* (sheets 101-112).

The statutory standards given in the *PRR-NYC* case differ from those announced in *Northern Lines.* Indeed, the dissent of Commissioner Tuggle in *Northern Lines* should be read in conjunction with his majority opinion in *PRR-NYC.* The dissent is largely predicated upon alleged erroneous statutory standards. The inconsistencies between *PRR-NYC* and *Northern Lines* on such a fundamental principle as the applicable statutory standards would require, if both decisions were reviewed by the same U. S. District Court, that both cases be remanded to the Commission for a resolution of the conflict in the first instance by the regulatory agency.

Protestant Milton J. Shapp believes neither decision adequately describes the statutory standards which the Commission must follow in approving railroad mergers, although the law set forth by Commissioner Webb, writing for the majority in *Northern Lines,* more adequately construes the applicable law than does the majority opinion of Commissioner Tuggle in *PRR-NYC* and his dissent in *Northern Lines.*

The "Tuggle" Standards

The statutory standards in the *PRR-NYC* report are found on pages 494, 503 through 510, and 520. The term "public interest" is defined on page 494 as relating to the public interest in the maintenance of an adequate transportation system, defined by reference to the purposes of transportation legislation, citing the decision of the U. S. Supreme Court in *United States* v. *Lowden,* 308 U. S. 225, 230, decided in 1939 prior to the 1940 enactment of the National Transportation Policy and also prior to the 1940 amendments to the railroad consolidation sections of the Interstate Commerce Act.

The second portion of the decision relating to the law of the case is on pages 503-510. A merger is said to be lawful under Section 5(2) if it can be found consistent with the public interest. Reference is made to *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 79-80, decided in 1944, for the proposition that the task of the Commission is to enforce the Interstate Commerce Act *and other legislation* which deals with transportation facilities and problems. (emphasis supplied) The report then recites the policy of Congress toward railroad consolidation prior to enactment of the 1920 legislation, and then the purpose of the Transportation Act of 1920, with citations to *Schwabacher* v. *United States,* 334 U. S. 182, 191-3 (1947), *County of Marin* v. *United States,* 356 U. S. 412, 416-7 (1957), and the Appendix to *St. Joe Paper Company* v. *Atlantic Coast Line Co.,* 347 U. S. 298, 315-21 (1954). The opinion of Commissioner Tuggle then sets forth the four tests governing railroad consolidations laid down by the U. S. Supreme Court in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25, decided in 1932.

The *PRR-NYC* report next discusses the relationship between the Interstate Commerce Act and the antitrust laws. The 1923 case of *Control of Central Pacific by Southern Pacific,* 76 I.C.C. 508, is cited for a vague "public benefits" test:

> "Evidence as to public benefits to be derived from common control of competing carriers which would be immaterial in a prosecution under the Sherman Act, *might be* entirely appropriate in a proceeding before us under Section 5(2). There is therefore a dissimilarity of issues and in the nature of the proceeding. . . ." (76 I.C.C. 508, 516)

With respect to competition, the recent decision of the U. S. Supreme Court in *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965) is cited to show that the competitive consequences of a proposed rail merger may be judged by transportation standards which may or may not overlap with market criteria employed in antitrust cases. These transportation standards are stated to be the curtailment of competition upon shippers and shipper interests who today have a choice between PRR and NYC; and upon other carriers who join with either applicant in through routes and joint rates in competition with the other applicant. As the final transportation standard, the Commission considers intermodal competition and also whether there is any railroad *increased* intramodal competition.

The third, and final, treatment of the statutory standards is reference to the postal service and national defense, found on page 520. These two elements are specifically named in the National Transportation Policy. The report notes that no official responsible for defense or mail has raised the question of the impact of the proposed merger upon these two national activities. However, it is stated that to the extent the Post Office and Defense Departments elect to use applicants' services *in ordinary times*, the benefits of the merger will accrue to them as to all users. (emphasis supplied)

As will be demonstrated in this petition for reconsideration, the above recitation of statutory standards is in serious error. In order to give every benefit of the doubt to the report, it is advisable to consult the dissent of Commissioner Tuggle in *Northern Lines* for further clarification of his legal position.

In *Northern Lines*, pages 101-106, Commissioner Tuggle asserts that the Transportation Act of 1940 did not change the policy favoring consolidations embodied in the 1920 legislation. Competition retains significance chiefly as an aid in attaining the objectives of the National Transportation Policy, citing *McLean Trucking Co.* v. *United States*, 324 U. S. 67, 85-6. The 1940 legislation is said to have resulted in a change in the means rather than in the ends, and was designed to facilitate merger and consolidation, citing *County of Marin* v. *United States*, 356 U. S. 412, 416-8; *Schwabacher* v. *United States*, 334 U. S. 182, 191-3; *Maintenance Employees* v. *U. S.*, 366 U. S. 169, 173.

Commissioner Tuggle asserts that since 1940 a merger proposal need not *promote* the public interest. It need only be consistent with the public interest, as defined in *Pacific Power & Light Co.* v. *Federal Power Commission*, 111 F. (2d) 1014, 1016 (9th Cir., 1940):

> "does not connote a public benefit to be derived or suggest the idea of a promotion of public interest . . . the thought conveyed is merely one of compatibility."

Furthermore, the test of public interest for transportation is again stated to be the four criteria mentioned in *New York Central Securities Corp.* as cited in *United States* v. *Lowden,* 308 U. S. 225, 230 (1939).

The "Webb" Standards

The statutory standards in the *Northern Lines* report are found on sheets 65-7 and 87-92. The first portion of the statutory standards is entitled "Applicable Standards." At the outset, Commissioner Webb notes that *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 85 directs that the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed merger and consider them along with various advantages to determine whether the proposal will assist in effectuating the overall transportation policy. But the appraisal of the adverse competitive effects need not be made by the usual antitrust geographical and product markets, citing *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965). The Commission is not precluded from measuring the competitive consequences by transportation standards. Commissioner Webb concludes that the Commission must accommodate the antitrust laws with the Transportation Act, but that the antitrust standards are not to be used as a measure.

The second discussion of statutory standards in *Northern Lines* is on sheets 87-92. Commissioner Webb recites the four specific provisions of Section 5(2) (c) of the Act that the Commission is required to consider. These four factors plus the substantial lessening of competition are to be weighed against any advantages to be derived by applicants and the shipping public. In undertaking this balancing process, the Commission is to approach every transaction under Section 5(2) with an attitude of strict neutrality, there being no presumption in favor of approval, since the 1940 Act significantly altered the pro-merger policy of the 1920 Act.

The standard for "public interest" is said to be a showing of compatibility with the public interest, and not a showing that the unification would promote or advance the public interest, citing *C&O-B&O,* 317 I.C.C. 261, 285 which in turn is predicated upon *Pacific Power & Light Co.* v. *Federal Power Commission*, 111 F. (2d) 1014, 1016).

The financial condition of the major applicants is said to be a highly material fact.

Commissioner Webb concludes that the duty of the Commission is to accommodate the antitrust laws with other legislation dealing with transportation, citing *McLean*. The extent to which a proposed merger may lessen competition, if substantial, must be weighed along with all other indicia of the public interest, pro as well as con.

The Correct Statutory Standards

The "Tuggle" and "Webb" theories have been described at length to illustrate different approaches as to the applicable law. The theory of each Commissioner could be helped by further clarification.

The basic starting point for a legal analysis of the Commission's power and responsibility over railroad consolidations is the Transportation Act of 1920. That Act introduced a new railroad policy. Weak railroads were to be assisted by earnings recaptured from stronger lines; a master plan for railroad consolidation was authorized; the power of the Commission to readjust divisions of joint rates was broadened; a fair return on capital devoted to transportation service was a legislative goal.

The opinion of Justice Brandeis in *New England Divisions Case*, 261 U. S. 184 (1923) spelled out that new transportation policy. The decision reviewed the legislative history of the 1920 Act to conclude that there was a national transportation policy created by Congress.

The *New England Divisions Case* became the predicate for the opinion of Chief Justice Hughes in construing the "public interest" criteria governing railroad consolidations in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12 (1932). Based upon the policy of the 1920 Act, the four factors comprising the "public interest" were (1) adequacy of transportation service, (2) economy of service, (3) efficiency of service, and (4) appropriate provision and best use of transport facilities.

The *New York Central Securities Corp.* test of the public interest was followed by the Supreme Court in other carrier unification cases arising out of the 1920 legislation. *United States* v. *Lowden,* 308 U. S. 225 (1939); *Texas* v. *United States,* 292 U. S. 522.

The 1920 amendment to Section 5(2) authorized unifications, other than consolidation into a single system for ownership and operation, which "will be in the public interest." Mergers had to conform to the tentative plan, but there could be consolidations by agreement which, *inter alia,* the Commission could find that the "public interest will be promoted."

The Emergency Railroad Transportation Act of 1933 made certain amendments to the consolidation provisions of the Interstate Commerce Act, particularly to extend its provisions over corporations controlling railroads. The 1933 legislative purpose was to be considered along with the overall transportation policy found in the 1920 Act. *Texas* v. *United States,* 292 U. S. 522, 530-4.

The next step in the evolution of the present statutory standards was the enactment of the present National Transportation Policy in 1940. The same Transportation Act of 1940 revised the railroad consolidation policy. Section 5(2) commands the Commission to give weight to four considerations, among others: (1) adequacy of transportation to the public, (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the involved territory, (3) total fixed charges, and (4) the interest of the carrier employees affected. The Commission may impose such terms and conditions as it finds to be just and reasonable. The ultimate statutory finding is that the consolidation "will be consistent with the public interest."

The two important changes in the consolidation provisions of the Interstate Commerce Act made by the 1940 Act were: (1) Railroad mergers were henceforth to originate voluntarily with the carriers and need not conform to an overall Commission plan; and (2) The much more comprehensive National Transportation Policy superseded the more limited transportation policies of the 1920 and 1933 transportation legislation.

It is immediately apparent that the "Tuggle" majority opinion in the *PRR-NYC* merger case is fatally defective, since it is based upon the definition of "public interest" contained in the policy underlying the 1920 Act, rather than upon the National Transportation Policy amendment to the 1940 Act. Commissioner Tuggle specifically cites the reference *New York Central Securities Corp.* test as contained in *United States* v. *Lowden,* 308 U. S. 225, 230, on page 494. (327 I.C.C. 475, 494) Again, on page 505, Commissioner Tuggle positively adopts *New York Central Securities Corp.* as controlling in the *PRR-NYC* case. (327 I.C.C. 475, 505) Yet the four criteria of *New York Central Securities Corp.* clearly apply only to the transportation policy of the 1920 legislation as construed by Justice Brandeis in *New England Divisions Case.*

Both the "Webb" and "Tuggle" expressions make some reference to *McLean Trucking Co.* v. *United States,* 321 U. S. 67, decided in 1944, the first carrier consolidation case to reach the Supreme Court construing the 1940 amendments to Section 5(2) with the new National Transportation Policy. It is thus very unfortunate that the majority opinions in *Northern Lines* and *PRR-NYC* fail to consider *McLean* carefully. For *McLean* does not merely hold that the Commission need not be bound by the antitrust laws, and that there be an accommodation between the lessening of competition and any public benefits, pro or con. Rather, the real importance of *McLean* is that the Commission's guide to the public interest is the new National Transportation Policy.*

Accordingly, among the *other* factors to be considered by virtue of Section 5(2)(c) are the specific mandates of the National Transportation Policy, and it is the NTP which must be *furthered* for any railroad merger to receive approval. It was only by virtue of an activist promotion of the NTP that permitted the Court in *McLean* to hold that the antitrust laws are not a bar to carrier unification.

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*321 U. S. 67, 82; see also: *Schaffer Transportation Co.* v. *U. S.,* 355 U. S. 83, 87.

The Commission, upon reconsideration, is urged to carefully review *McLean*, because *McLean* completely nullifies the *New York Central Securities Corp.* test used in the *PRR-NYC* decision. Nor may comfort be found in the construction of "will be consistent with the public interest" in Section 5(2)(b) to mean a negative "not contradictory or hostile to the public interest," or as not to connote a public benefit to be derived, or suggest the idea of a promotion of public interest. This negative and pessimistic view of the public interest is not explicitly found in the *PRR-NYC* report, but the philosophy behind such an interpretation of the public interest permeates the entire decision. Commission Tuggle, dissenting in *Northern Lines*, openly adopts the "not contradictory or hostile" test of the public interest, as does the majority opinion of Commissioner Webb in *Northern Lines* (Sheets 88, 105).*

It is important to keep in mind that the "public interest" is an evolving concept. The transportation policy found by Justice Brandeis in *New England Divisions Cases* was the predicate for *New York Central Securities Corp.* This 1920 policy plus the Emergency Railroad Transportation Act of 1933 constituted the framework for *Texas* v. *United States.* The Transportation Act of 1940 brought about a new concept of the "public interest" with the enactment of the National Transportation Policy, as noted in *McLean.*

The report of the Commission in *PRR-NYC* stops with the Transportation Act of 1920. The entire report is thus erroneous because it is premised upon incorrect standards as to the Commission's duties.

Furthermore, "public interest" has not stood still since the 1944 decision in *McLean.* That decision expressly states that the Interstate Commerce Act *and other legislation* dealing specifically with transportation problems constitute the

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*The "not contradictory or hostile" definition of the public interest stems from *Pacific Power & Light Co.* v. *Federal Power Commission*, 111 F. 2d 1014 (1940), but the Ninth Circuit distinguished the Federal Power Act from the Interstate Commerce Act and, of course, the former does not have the NTP declaration which is read into Section 5(2) of the latter act.

immediate frame of reference within which the Commission operates, and the policies expressed therein will be the basic determinants of its action. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 79-80. There has been important transportation legislation enacted subsequent to *McLean*, which the Commission must consider. As protestant Milton J. Shapp stressed in his Exceptions to the recommended report, the Commission must also consider the Employment Act of 1946, Area Redevelopment Act of 1961, Manpower Development and Training Act of 1962, Economic Opportunity Act of 1964 and the Appalachian Regional Development Act of 1965.*

The fact that the Commission "may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view" is noted in the majority opinion in *Northern Lines* (Sheet 67). However, the majority opinion in PRR-NYC completely ignores this new legislation affecting transportation which is later in time than the enactment of the National Transportation Policy. It is error for the Commission not to consider this subsequent transportation legislation. Indeed, the decision in *PRR-NYC* stops with the outdated transportation policy of the 1920 Act and *there is even no mention of the specific criteria set forth in the present Section* 5(2) (c) other than in one paragraph of the perfunctory "Statutory Findings and Ultimate Conclusions" at the end of the report. (327 I.C.C. 475, 546-7).

The Commission, upon reconsideration, is also urged to consider the national defense and the postal service, both *specific* mandates of the National Transportation Policy, "which is the Commission's guide to the public interest," and the yardstick the Commission must use in consolidation proceedings. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82, 87.

It is well known that various officials of the Department of Defense have in recent years indicated concern about the adequacy of the railroad plant in terms of national defense requirements. This concern for national defense has been echoed by numerous railroad officials. Witness Perlman, president of the New York Central, admitted that the merged road would not have the amount of rolling stock required to handle the World War II volume of business (Tr. 1271). Other statements of railroad officials and leading transportation spokesmen who are concerned with the adequacy of railroad transportation for the national defense may be found in Witness Keyserling's testimony (S-185, pp. 42-3).

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*15 U.S.C. 1021; 42 U.S.C. 2501; 42 U.S.C. 2571; 42 U.S.C. 2701; 40 U.S.C. App. 2.

The Commission disregards the defense testimony, using the negative standard of an absence of official testimony (327 I.C.C. 475, 520):

> This record has been challenged as according insufficient consideration to the postal service and national defense. By directive of the national transportation policy we are to administer the act so as to satisfy the transportation requirements of those two national activities. No official responsible for defense or mail has raised the question, however. To the extent the Post Office and Defense Departments elect to use applicants' services *in ordinary times*, the benefits of the merger will accrue to them as to all users. To the extent that the merger invigorates the applicants and, by reaction, stimulates their competitors, the Nation's transportation system will grow that much more capable of withstanding the extraordinary stresses of war or other national emergency. Nothing *material* of record supports a conclusion that the merger will make the transportation system any less able to serve the Nation's mail or defense needs." (emphasis supplied)

It is difficult to imagine a proceeding before the Commission where the national defense issue is more important than it is here. The PRR-NYC merger will amalgamate $5.2 billion in assets. It is the largest merger in American corporate history—greater than the 1901 creation of U. S. Steel by the late J. P. Morgan—and by far the largest consolidation proposed under the Interstate Commerce Act.

The concentration of traffic by the largest U. S. railroad (PRR) and the second largest U. S. railroad (NYC) over the same roadbed of the merged system raises a real defense issue. Similarly, the funneling of so much freight through one major yard (Selkirk, N. Y.) creates an uneasy defense setting with regard to aerial attack. The two largest ocean ports, Philadelphia and New York, will be in the hands of one railroad management. What are the defense implications of port traffic concentration? It was port congestion in World War I that directly resulted in nationalization of our railroad system until 1920.

A staff study by the Commission itself recognizes the role of national defense in railroad merger proceedings:

> "2. *National defense*
>
> This standard is contained in the National Transportation Policy but apparently has not been considered separately as a specific public interest criterion in rail merger cases. There is some evidence of a growing amount of interest by members of the Congress in the effect of proposed railroad mergers on national security. The growing possibility of abandonment of duplicate track or facilities, the cutting back of certain rail services, the scrapping of older equipment in furtherance of merger plans, all highly desirable in terms of railroad economy, could be undesirable from a national defense and military preparedness standpoint. It might be beneficial in the public interest to set forth national defense as a criterion for separate evaluation in each consolidation proceeding." ***(Railroad Consolidations and the Public Interest—A Preliminary Examination)*** Staff Study by Bureau of Transport Economics, Interstate Commerce Commission. Statement No. 6201, File No. S1-D-8, Washington, D. C., March 1962, p. 73; Reproduced in ***Rail Merger Legislation***, Hearings before Senate Subcommittee on Antitrust & Monopoly, 87th Congress, 2nd Session, on S. 3097, Part 2, p. 886).

Responsive to Congressional criticism that the public interest was not being adequately represented in rail merger proceedings, the Commission directed its Bureau of Inquiry & Compliance to participate in the proceeding so as to develop an adequate record. The Bureau, however, apparently made no request of Defense officials for testimony on national defense aspects of the merger, despite the staff study of the Commission's economists and despite genuine Congressional concern over military aspects of the case.

This attitude of the Bureau is in marked contrast with its behavior in another proceeding. In I. & S. Docket No. 7344, *Plastics from Texas to the East,* the Bureau was directed to participate in a rate case involving competition between coastwise steamship vessels and the railroads for the transportation of plastics from Texas to various destinations in the Northeastern United States, by order dated February 17, 1964. Previously, on January 21, 1964, I.C.C. Chairman Goff had written a public letter to Robert S. McNamara, Secretary of Defense, requesting that a defense witness testify concerning domestic shipping that might be threatened by railroad rate slashes.

Chairman Goff traced the history leading up to the decision of the Supreme Court in *I.C.C.* v. *New York, N.H. & H.R. Co.,* 372 U. S. 744. The Commissioner cited the National Transportation Policy with its directive that the Interstate Commerce Commission consider the national defense implications in its proceedings. The *New York Journal of Commerce* carried an extensive signed article by reporter Ben Kelley on the Goff letter in its issue for January 23, 1964, and, of course, the letter is a matter of public record.

Thus at the very time the Bureau of Inquiry & Compliance (now titled Bureau of Enforcement) was *developing* the record with defense testimony in one case, it was at the same time refusing to develop the defense aspects of the same National Transportation Policy in the *PRR-NYC* merger case, despite the clear warning of the staff of the Bureau of Transport Economics & Statistics (now titled Bureau of Economics).

In all fairness to the Bureau of Enforcement, it should be pointed out that its participation in the rate case was initiated by two coastwise steamship companies, whereas its participation in the pending merger cases apparently came from leading members of the Congress of the United States concerned, *inter alia,* with the defense implications of current merger proposals.

The report of the Commission adopted the position of applicants that the burden of proof with respect to national defense rests upon intervenors and is not part of the affirmative case, since applicants only have the burden of showing that the transaction "will be consistent with the public interest" as specified in Section 5(2) (b). (App. Reply to Exceptions, pp. 32-35) This view is erroneous. Our country has been in an almost continuous war emergency posture since enactment of the defense requirement of the NTP on September 18, 1940. The *ordinary times* of the Commission can only relate to the peaceful years of the 1920s. Events since 1945 have witnessed the civil war in Greece, the Suez Crisis, NATO, SEATO, the Berlin Airlift, Korean police action, Lebanon landing, Formosa Straits naval patrol, and now Vietnam. One can only conclude that, in the 26 years since 1940, military matters have dominated governmental policies.

Applicants have the burden of coming forward with defense testimony. The decision in *McLean* holds that the NTP is to be the guide to the interpretation of the "public interest" mentioned in Section 5(2) (b). Certainly the scope of the proposed transaction and the military commitments of the United States, which the Commission should officially notice, requires that the merger be disapproved in the absence of affirmative defense testimony to offset the negative implications of record.

Even assuming, *arguendo*, that the burden of proof as to national defense lies with intervenors rather than with applicants, then the Commission through its Bureau of Enforcement as an intervenor, must bear the burden. For the Commission cannot inform Congress that the Bureau will develop the record and then fail to insist that the Bureau perform its duties. Other parties, including Milton J. Shapp, have a right to rely upon the Commission performing its duty, once it has ordered its staff to carry out the wishes of Congress. The Commission is in a far superior position, as a federal agency, to secure defense and postal testimony than are any of the parties.

Finally, it cannot be inferred as the Commission has done on page 520 of its report, that a merger which may invigorate the applicants and stimulate their competitors will result in a transportation system that will be much more capable of withstanding the extraordinary stresses of war or other national emergency. On the contrary, and as noted by the Commission's economists in their published staff report, greater profits earned by a higher degree of utilization of the railroad plant capacity through merger of competitors and the resultant reduction of competitive capacity, mean a lesser amount of defense potential.

Early 1966 saw the issuance of special car service orders by the Commission to increase the effective equipment capacity. These orders were unprecedented for peacetime, having heretofore been reserved for war emergency periods. The last remaining opportunity for greater utilization of capacity in wartime is being sacrificed in the current railroad merger mania. There will thus be no military reserve for emergencies. There is no merit to the Commission's contention that greater railroad profits mean a greater defense potential.

Analysis of Competition

It has been demonstrated that the report of the Commission is defective in its failure to analyze the statutory standards governing this proceeding. Nor will the record support the necessary findings to comport with the statutory requirements. This is because applicants, as the Commission, have based their case on the now-outmoded *New York Central Securities Corp.* criteria.

One of the "other factors" which the Commission must consider under Section 5(2) (c) is the substantial lessening of competition which will result from the proposed consolidation. *McLean Trucking Co.* v. *United States, supra; Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173.

The Supreme Court in *Seaboard Air Line R. Co.* v. *U. S.*, 382 U. S. 154, held that the lower court erred in holding that the Commission must determine whether a merger would violate Section 7 of the Clayton Act by reference to the relevant product and geographic markets. The opinion of the court does not reject the analysis of the competitive impact of a proposed merger by reference to the relevant product and geographic markets, but only that the Commission is not required to determine whether Section 7 of the Clayton Act would be violated by the merger.

The Commission in *PRR-NYC* and in *Northern Lines* has rejected the analytic technique of measuring competition by the relevant product and geographic market enunciated in *Brown Shoe Co.* v. *United States,* 370 U. S. 294. The opinions of Commissioner Tuggle and Commissioner Webb each indicate that transportation standards rather than market criteria are to be employed by the Commission in evaluating railroad mergers. (327 I.C.C. 475, 505, 509-10; Sheets 65-7)

The Commission, however, errs in its definition of the relevant transportation standards. The competition considered relevant by the Commission is confined to *carrier* competition facing the PRR or NYC. This carrier competition is both intermodal as well as intramodal. (327 I.C.C. 475, 509-520)

Completely overlooked is the *market* competition between the PRR and NYC. Market competition involves railroad competition in the promotion of shippers' products on its own line against another railroad having a shipper producing the same article on its line where both shippers compete in a common market. An example is the movement of export coal from mines on the PRR in central Pennsylvania in competition with coal mined on the N&W moving to European markets, described by Witness Saunders in his New Castle speech. (Shapp pet., App. A, p. 19-20)

The report of the Commission errs in confining its analysis to railroad competition between pairs of cities commonly served. (327 I.C.C. 475, 512-13) Protestant Milton J. Shapp raised the failure of proof by applicants on this issue, and the error of law of the hearing examiners,* as one of his major exceptions to the recommended report. (Shapp Exceptions, pp. 14-17)

The Commission has heretofore uniformly held that competition for the purposes of Section 5 of the Interstate Commerce Act and Section 7 of the Clayton Act must include *market* competition as well as *carrier* competition. *Directors of Wheeling & Lake Erie*, 138 I.C.C. 643, 649; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 152 I.C.C. 721, 723; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 160 I.C.C. 785, 789. The distinction between market competition and carrier competition permeates the rates and practices litigation before the Commission. Applications for fourth section relief as published in the *Federal Register* always distinguish between market and carrier competition.

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*The hearing examiners term the 18 city-pair study, "The only study of record which attempted to provide a realistic measure of competition between railroads." (Rec. Rep., p. 162-3)

Accordingly, judged by the transportation standards used by the Commission over the years in evaluating competition between railroads, the record and report in this proceeding are fatally defective *as a matter of law*. If the Commission had the requisite evidence of market competition between the PRR and NYC, it might have given much greater weight to the anti-competitive features of the proposed merger, and even conclude to deny the merger.

The superficial analysis of the Commission, whereby market competition has been ignored, is illustrated by *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 152 I.C.C. 721, 731:

> "Where different railroads are engaged in hauling the same commodity from different fields to the same consumers, it seems obvious that railroad competition must exist in a very positive form."

Other Antitrust Standards

The Commission is directed to consider the policy of *all* of the antitrust laws in making the requisite accommodation with the Interstate Commerce Act. There is nothing in *McLean* or *Minneapolis* to suggest that the policy behind Section 7 of the Clayton Act should be the only consideration of antitrust policy by the Commission. Indeed, *Minneapolis* specifically holds that Section 10 of the Clayton Act and all of the antitrust laws are to be considered (361 U. S. 173, 190, fn. 12).

One of the important antitrust considerations is the gigantic interlocking directorates which will occur with the unification of $5.2 billion in PRR-NYC assets. A tremendous combine will be created between the railroad industry, insurance companies, financial institutions, and leading industrial corporations. Sections 8 and 10 of the Clayton Act are aimed at this problem as is the Sherman Act.

Extensive testimony was introduced concerning the monstrous clearing house that will be created by the proposed merger (S-260; H-250 through H-262; H-265 through H-272). Part of this testimony has been summarized in the Spring 1965 issue of the University of Illinois Quarterly Review of Economics, Vol. 5, No. 1, Fixler, L. D., *Interlocking Directorates and Railroad Mergers*, pp. 7-26.

Protestant Milton J. Shapp made a major point in his exceptions that the recommended report failed to consider the interlocking directorates arising from the proposed merger (Shapp Exceptions, pp. 19-20). The failure to even mention this issue, or to weigh this factor with adequate findings along with other evidence, renders the Commission's decision erroneous *as a matter of law.*

Closely allied with interlocking directorates, in principle, is the reciprocity between railroads and shippers with respect to railroad purchasing policies. This is also an antitrust feature to which Dr. Fixler, witness for the Pennsylvania AFL-CIO, devoted considerable attention, and which the Commission is required to evaluate under *McLean* and *Minneapolis.* As the Commission itself stated in *Reciprocity in Purchasing and Routing,* 188 I.C.C. 417, 419:

> "It is quite a common practice for carriers to receive bids, and after determining the lowest bid to advise other bidders thereof, and then to divide purchases proportionally among these bidders who are willing to meet the low bid. The division is made according to the commercial tonnage of the respective bidders which has been or is to be routed over the lines of the purchasing carrier."

The PRR is an enormous purchaser of supplies. The consolidated income statement of the PRR for 1965 shows that the PRR spent $306,421,425 for materials, utilities and other charges. Many businesses in Pennsylvania are dependent upon the PRR for sales. The NYC also operates in the state. The combined purchasing power of the merged system could drastically alter present purchasing practices and improve the bargaining power of the merged system over that which the PRR and NYC now enjoy separately.

The Commission is required to consider these matters under the doctrine of *McLean* and *Minneapolis*.* Its failure to do so requires that the Commission reconsider its action in this proceeding.

Summary of Statutory Standards

The statutory standards which should govern this proceeding are not those in *New York Central Securities Corp.* as followed in *U. S.* v. *Lowden*.

The criteria which must be considered are those specifically set forth in Section 5(2)(c) and *others*. The "other" criteria are the effect upon competition as expressed in the policy of the antitrust laws, the National Transportation Policy, and laws affecting transportation enacted subsequent to 1940.

The report of the Commission is wholly inadequate as a matter of law because it is predicated upon the Transportation Act of 1920, as construed by the Supreme Court, rather than upon the 1940 Act and subsequent legislation.

Since applicants are the proponent of an order, they have the burden of proof as to all matters set forth in Section 5(2)(c), those items specifically named in the NTP, and also the duty of coming forward with detailed traffic studies showing the carrier and market competition involved.

There can be no dispute over the fact that applicants have not met the burden of proof as to the "public interest" defined herein.

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*Reciprocity is covered by Section One of the Sherman Act, Section 5 of the Federal Trade Commission Act, Section 10 of the Clayton Act, and recently by Section 7 of the Clayton Act, *Federal Trade Com.* v. *Consolidated Foods Corp.*, 380 U. S. 592.

2. The Report Fails to Make the Necessary Findings Required by Section 5(2)(c)(4) of the Interstate Commerce Act.

The Commission is required to give weight to "the interest of the carrier employees *affected*" by the proposed transaction. This requirement is expressly set forth in Section 5(2) (c) (4) of the Act.

The report of the Commission, however, only makes this statutory finding and ultimate conclusion with respect to "the protection of railway employees entitled thereto." (327 I.C.C. 475, 546) Only the employees of the PRR and NYC are deemed to be "affected" by the transaction or "entitled" to protection.

The Commission has erred in not considering the impact of the proposed merger upon railroad employees of carriers which will suffer diversion of traffic as a result of a merged PRR-NYC system. The Commission must weigh this adverse impact along with all other factors in determining whether the transaction should be approved. Yet the Commission has made no findings, and has prescribed no protection, for employees other than those on the PRR and NYC.

The courts have ruled adversely to the Commission on this issue. As was stated in *Railway Labor Executives' Assn. v. United States*, 216 F. Supp. 101 (E.D. Va. 1963):

> "The Act does not, as the Commission would say, limit its security to employees of a carrier involved in the transaction. The guardianship is not dependent upon the role of their employers in the transaction. All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected': Are they touched sufficiently by the transaction?"

The Commission has found it necessary to include the New York, New Haven & Hartford Railroad Company and the New York, Susquehanna & Western Railroad Company in the transaction. But the adverse impact upon the employees of these two carriers was not considered in determining whether the PRR-NYC merger is consistent with the public interest.

The Erie-Lackawanna Railroad Company, Delaware & Hudson Railroad Corporation and Boston & Maine Railroad Corporation have each been given special revenue protection during the period that their status in some rail system is being determined. The merged PRR-NYC system is obligated to reimburse the owners of these other railroads if the PRR-NYC increases its traffic in relation to any of the other three carriers. But the carrier employees on the E-L, D&H and B&M are to receive no compensation from the PRR-NYC as a result of traffic diverted from their employers to the PRR-NYC, nor was this impact considered, as required, under Section 5(2)(c)(4).

The diversion of traffic from Monon Railroad, Chicago & Eastern Illinois Railroad Company, Brooklyn Eastern District Terminal, Central Railroad Company of New Jersey, Reading Company and Western Maryland Railway Company, is not considered so substantial as to warrant protective conditions at this time. Nonetheless, the effect upon employees of these carriers must be considered. The Commission has failed to weigh this adverse impact in passing upon the transaction.

Employment on railroads operating in the Commonwealth of Pennsylvania is important to the welfare of many communities and many businesses dependent upon dollars earned from railroad employment. It is erroneous for the Commission to only consider PRR and NYC employees, and to ignore other railroads serving Pennsylvania, such as D&H, E-L, Reading, CNJ, B&O and Western Maryland.

3. The Report Errs In Not Imposing Protection for Affected Employees on Other Railroads.

In addition to its failure to consider the interest of all railroad employees who will be affected by the proposed merger in determining whether the merger will be consistent with the public interest, the report also errs in not imposing protective conditions for employees on railroads other than the PRR and NYC who will be adversely affected by the merger.

Section 5(2)(f) of the Interstate Commerce Act states that the order of the Commission "*shall* include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in *employees of the carrier or carriers by railroad affected by such order* being in a worse position with respect to their employment. . . ." (emphasis added)

The report of the Commission finds that the N.H., NYS&W, E-L, D&H, and B&M will be adversely affected by the proposed merger, and conditions are provided under Sections 5(2)(b) and 5(2)(d) for these carriers. It is a strange rule of law to hold that the security holders of these carriers are to be protected from the full impact of the merger, whereas their employees are entitled to no protection whatsoever.

The concern of protestant Milton J. Shapp over employment in Pennsylvania on railroads other than applicants is shared by the railroad brotherhoods. Counsel Mahoney, representing the Railway Labor Executives' Association and the International Association of Machinists, stated the law during oral argument.

> "But the clients whom I represent, they represent employees in railroads and on railroads other than the applicants. The interests of these employees of these other railroads must be considered and weighed under Section 5(2)(c)(4) of the Act. Protection, I respectfully submit, must be afforded these people under Section 5(2)(f) of the Act. (Tr. 20,032)
>
> "Commissioner Tucker: In this case your interest is solely with respect to imposition of employees' protective conditions; is that correct?
> Mr. Mahoney: Which, as I said at the outset, was taken care of. But there are other employees that we represent on other railroads which we urge the Commission to consider and protect in passing upon this merger, because I feel certain they will be affected." (Tr. 20,034-5)

4. The Report Fails to Comply with the Requirements of the Administrative Procedure Act.

The initial report of the hearing examiners consists of 586 pages, which the Commission concedes is "unusually large." (327 I.C.C. 475, 482) Protestant Milton J. Shapp excepted to the form of the report in that the report failed to set forth with particularity findings of fact to support its conclusions. The initial report required search from beginning to end to try to pick up the findings. The initial report also contained multiple statements as to beliefs. (Rec. Rep., pp. 93, 442, 443)

The Commission answers that the initial report has been adequately organized and indexed. (327 I.C.C. 475, 482) However, this is clearly not the case from an inspection of the initial report. Protestant Milton J. Shapp hereby reaffirms his contention that the initial report violates Section 8(b) of the Administrative Procedure Act and that protestant has thus been denied the procedure required by law.

Section 8(b), 5 U.S.C. §1007(b) provides in no uncertain terms that all administrative decisions shall "include a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." The complicated, disorganized and inarticulate exposition of diverse assertions is an insufficient basis for administrative action. As pointed out in *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168-169 (1962) administrative findings must not only be supported by substantial evidence but must articulate the rational basis for the administrative action — *post hoc* arguments drawn from uncorrelated portions of the record do not suffice to justify purported findings and conclusions:

> "The short answer to this attempted justification is that the Commission did not so find. Securities & Exch. Com. v. Chenery Corp. 332 U. S. 194, 196, 91 L ed 1995, 1999, 67 S Ct 1575, 1760. The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> " '[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency

alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . .' "

The report of the Commission compounds the procedural error. The Commission states that the 586 page report of the examiners will now be attached to the report of the Commission in printed form in the permanent series of Interstate Commerce Commission reports. The Commission then says:

> "We adopt the examiners' account of the facts, since no material exceptions were taken thereto, most exceptions having been directed at the conclusions. Also adopted are those conditions, findings and conclusions of the hearing examiners (including those pertaining to procedural and evidential matters) which we do not here modify or reject" (327 I.C.C. 475, 481-2).

The report concludes:

> "Our decision is based on the major issues involved. A number of the exceptions and arguments not referred to are obviously advanced only to provide, through collateral contentions, support for the principal position of a particular intervener. Such exceptions and arguments, although not always specifically discussed herein, have been considered and found to be without merit" (327 I.C.C. 475, 547).

The parties to this proceeding are thus faced with a 91-page report of the full Commission plus a 586-page report of the examiners incorporated by the Commission. Yet the decision itself is only "based on the major issues involved."

It is difficult to imagine a clearer violation of the rule that parties must not be left to spell out, to argue, to choose between conflicting inferences, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-11 (1935).

Protestant Milton J. Shapp made many detailed exceptions to matters of fact, conclusions, and statement of law. Apparently these are considered "immaterial," or at least not a "major issue." The report places an insuperable task upon the parties to speculate as to just what findings of fact are deemed material to the decision.

The Supreme Court has declined to place such a burden on parties, and has condemned the type of report issued herein, for there must be positive findings. The court said in *Florida* v. *United States*, 282 U. S. 194, 215 (1931):

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit."

The lack of an express finding cannot be supplied by implication, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433 (1935).

The report of the Commission is vague as to its findings and conclusions, as well as the reasons or basis therefor, in violation of the Administrative Procedure Act. The Commission, upon reconsideration, is requested to issue a report in compliance with the procedure required by law.

5. The Report Errs in Its Fundamental Proposition That the PRR and NYC, Independently, Cannot Survive the Competition of The C&O-B&O and N&W-NKP Systems.

The Commission states its purpose in approving the merger:

> "In approving the PRR-NYC merger it is our purpose to open the way for the development of a modernized railroad system trimmed of unnecessary plant, unemcumbered by service obligations no longer responsive to the public needs, and free and able to grow as and where the Nation's transportation requirements dictate." (327 I.C.C. 475, 496)

The Commission found, in connection with its above stated purpose, that the applicants, merged, would have the resources to withstand the challenge of the two other great rail systems recently formed in the east by the Chesapeake & Ohio's control of the Baltimore & Ohio, and the Norfolk &

Western-Nickel Plate, et cetera, merger. The Commission said that it was "convinced" that the PRR and NYC, "if required to continue as independent lines, *could not keep pace with their common carrier obligations*, and neither they nor the public which depends upon them for service would benefit. (327 I.C.C. 475, 519) (emphasis supplied)

The separate expression of Vice Chairman Tucker emphasizes the theory that the merger is *necessary* because of the C&O-B&O and N&W-NKP unifications:

> "In my view, neither the Pennsylvania Railroad nor the New York Central Railroad could withstand the tremendous competition of the N&W system and the C&O-B&O system, particularly in the event of any sustained economic recession, and it would be unrealistic and improper to understate that fact in this case." (327 I.C.C. 475, 550)

Chairman Bush, speaking on behalf of the Commission to a "closed door" meeting of the press to explain the decision of the Commission stated:

> ". . . it is of record that they had to merge to meet the competition of the major mergers we have had before us —like the C&O-B&O and the N&W" *(Traffic World*, April 27, 1966, p. 4).

The above rationale, i.e., that the PRR-NYC merger is compelled by the C&O-B&O and N&W-NKP consolidations, is unsupported by substantial evidence, or indeed, by any material and probative evidence.

This new theory was not the foundation for the recommended report of the examiners—their theory was the "failing company" doctrine which has been refuted by events. Nor was the new theory advanced by applicants. The record does not contain any probative traffic studies or evidence bearing upon a crippling diversion of business from the lines of PRR or NYC. The Commission itself elsewhere admits that it is "too early to fully assess" the effect of the C&O-B&O and N&W-NKP upon applicants. (327 I.C.C. 475, 519)

The "new theory" to justify the PRR-NYC merger apparently arose during the oral argument held October 20-21, 1965, and apparently to the surprise of applicants themselves. During the early stages of his oral argument on October 20, 1965, Counsel Cousins stated on behalf of applicants:

> "Heretofore the Commission has voted for improved service in the east. In each of the four consolidations that have been approved, there was no doubt that other railroads would suffer some disadvantage, and applicants themselves are now experiencing the competitive pressures of the established N&W and C&O systems" (Tr. 19,760).

Commissioner Tucker thereupon interrupted the oral argument of Counsel Cousins:

> "Commr. Tucker: To what extent is that reflected on this record, the competitive pressures that applicants are now receiving from the C&O or N&W systems?
>
> "Mr. Cousins: The record closed too soon, and their mergers of course have been in effect since the record was closed.
>
> "Commr. Tucker: Was there any opinion evidence or projections on that in the record?
>
> "Mr. Cousins: Yes, I think there was, and I think the examiners advert to it in the record. I think in a few instances I have a quotation on that.
>
> "Commr. Tucker: Thank you." (Tr. 19,760-1)

The second argument of the day was presented by Counsel Gray, also on behalf of applicants. He stated during his argument:

> "The anti-competitive effect in the antitrust sense, as I have said about this merger, are these. There is little doubt, and even the exceptions, I should say that exceptions contend and I admit, that with the New York Central and Pennsylvania merger there will be a lessening of competition between them in the antitrust sense" (Tr. 19,790).

Commissioner Tucker thereupon interrupted:

"Commr. Tucker: At that point, let me ask you a question. Throughout all these records of eastern rail mergers we have heard acceptance of a concept of a three-system rail unification goal for the east. Isn't it a fact, or is it a fact that this three-system concept contemplates that the (Pennsylvania) and New York Central Railroads individually cannot effectively compete with the present Norfolk & Western and C&O systems?

"Mr. Gray: Commissioner, there is evidence in this record with regard to the effect of the C&O control of the B&O and the consummation of the N&W merger on the existing Pennsylvania and New York Central systems as they presently operate, and opinion evidence is there that the increase in competition, the degree of competition and the ability to compete that have been placed in the C&O and the N&W is very detrimental to the PRR and the New York Central system, and that at present there is an imbalance in that competitive field. What the record will support and the examiners have found that with the consummation of the C&O control of the B&O and the N&W consummation, those lines would offer a greater degree of competition to the Pennsylvania and the Central.

"Commr. Tucker: On the other hand, the three-system concept, so-called, comprehends that in the event of a Penn-Central unification C&O and B&O, separately and individually as they are now, could effectively compete with the unified Penn-Central system.

"Mr. Gray: It does contemplate that. It contemplates with the merger of the Pennsylvania and the New York Central there will be balanced competition in these three systems in the east." (Tr. 19,790-1)

Counsel Gray at the end of his argument supplied the reference requested by Commissioner Tucker of co-counsel Cousins:

"Commissioner Tucker, you will find the finding with regard to the greater degree of competition between the C&O and N&W on page 427 of the report."

Reference to page 427 of the examiners' report, however, confirms the original statement of Counsel Cousins that "the record closed too soon, and their mergers of course have been in effect since the record was closed." Page 427 contains the very mild statement of the examiners:

> "It is readily apparent, therefore, that a greater degree of competition can be expected than existed in 1960 as a result of the intervening consummation of the C&O/B&O and N&W transactions."

This is a far cry from the finding of the Commission that the PRR and NYC can no longer remain as independent lines and still keep pace with their common carrier obligations. Furthermore, the finding on page 427 related to the existence of competitive routes and not to overall matters of competition.

Commissioner Tucker finally put the question to counsel Saunders for the U. S. Department of Justice at the oral argument, and received the only answer permissible on this record:

> "Are you satisfied now that the Commission can make a finding in this proceeding that each of these railroads individually can effectively compete with the two systems that have been previously established?
>
> Mr. Saunders: Yes, sir; this is the judgment that my presence here today indicates." (Tr. 19,949)

The finding of the Commission that the PRR-NYC merger was made necessary by the C&O-B&O and N&W-NKP proceedings is contrary to the record.

6. The Report Errs in its Financial Analysis of Applicants.

The financial analysis of the PRR and NYC may be found, interspaced, between pages 494 and 501 of the report. (327 I.C.C. 475, 494-501) The important conclusion as to financial conditions, however, is later found on page 519, where the Commission holds:

> "In view of their vulnerable and highly sensitive financial situation and their persistent incapacity to produce

> profits from rail operations—as we have found elsewhere in this report—we are convinced, etc. etc."

It would be unduly repetitious for protestant Milton J. Shapp to again make detailed exceptions to the misleading financial data, much of which also may be found in the examiners' recommended report. There are, however, certain features of the financial analysis which have been revised and emphasized by the Commission that were given only minor consideration in the recommended report.

A. *Representative Years.* Protestant Milton J. Shapp took strong exception to the so-called representative years of 1926, 1947, 1952 and 1961, used by the examiners in their analysis of applicants' finances and operations. The years 1926, 1947, and 1952 were peak years in terms of the business cycle, whereas 1961 was a recession year (Shapp Exceptions, pp. 33-35, 38). The examiners used the year 1947; "where consideration of the first post war year divorced from actual war time operations was a necessary base " (Rec. Rep., p. 19, fn. 12).

The Commission, however, has now used the year 1947 for a different purpose:

> "The year 1947, as a post World War II year, provides data which we believe represent a reasonable compromise between the data of the war years when railroads handled traffic ordinarily handled by other modes and the data of later years when the other modes had captured traffic over and above that which might be expected to revert to them by reason of the cessation of hostilities."

It is erroneous and contrary to the evidence of record to hold that the year 1947 is now a "compromise" year. The trucking and domestic water transportation industries had not reverted to their normal operations by the year 1947, Professor E. W. Williams, chief economist for applicants, agreed that 1947 was not a representative year for eastern railroads since motor carrier competition did not recover from the war until 1949, and that 1950 is a more appropriate year (Tr. 3605-7). As protestant Milton J. Shapp pointed out in his exceptions in connection with another subject matter, but which is now appropriate here:

> "The railroads captured a tremendous volume of traffic from other modes during World War II which did not divert back to these other modes immediately after the war. Industrial decisions take years to change and the process is often slow. Second, this drawn-out and steady decline in railroad share of the traffic was accentuated by the fundamental changes in industrial pricing that occurred in the 1950s following the 1948 decision of the Supreme Court in *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948). The record does not contain the necessary information on the impact of the basing point decision upon railroad traffic and freight rate policies, principally because the examiners rigorously excluded much relevant information on this topic" (Shapp Exceptions, p. 26).

The Commission is urged to reconsider its conclusion that the year 1947 is a "reasonable compromise" year.

The further statement of the Commission is wholly incorrect:

> "For a study of at least one decade's operations, we would be hard pressed to find in this century a period of 12 consecutive years less affected by war or depression-caused abnormalities than the 1952-1963 period chosen by the hearing examiners." (327 I.C.C. 475, 495)

Counsel Keyserling, appearing on behalf of the jointly-represented Pennsylvania localities, pointed out the unrepresentative nature of the Eisenhower years used by the examiners in projecting the future during his oral argument on October 21, 1965:

> "First, as my first chart shows, they predicated their conclusions as to rail traffic upon the 2.4 percent rate of U. S. economic growth between 1953-60. As my chart shows, this was not typical of any relevant previous period in U. S. history since the turn of the century, except the era of the great depression.

"Second, the rate of economic growth in most recent years has been twice that high. It is more than twice that high this year and we are expending enormous resources to assure and assert that the needs of the future shall be responsive to the Great Society and not based upon the greatest period of economic stagnation we have had save for the great depression" (Tr. 20,060-1).

The report of the Commission thus errs in considering the 1952-63 period to be the most representative 12-year period in this century. The 1953-60 period of Republican rule of the Executive Branch was followed by the 1960-61 recession. The years 1962-63 hardly can be considered to balance the preceding 10 dismal years of economic performance. The Commission should reconsider the implication that the 1952-1963 period is representative for the future, and substitute for it the conclusions of Mr. Keyserling, a witness in the proceeding prior to his role as counsel for various Pennsylvania communities.

B. *Prospects for the Future*

The Commission states that, even accepting the projections of witness Keyserling for the national economy, there is no assurance that applicants' prosperity will keep pace with that of the nation as a whole. (327 I.C.C. 475, 495) The Commission concludes that the economy is subject to business fluctuations, and that it must be aware of the *probability* of economic imbalance and recession from time to time, and that there is a *real danger* that the U. S. economy may not always be as active and healthy as it is today. (327 I.C.C. 475, 497-8)

In thus disposing of witness Keyserling's extensive testimony in this proceeding, coupled with six days of cross-examination, (S-185; H-201 through 204; Tr. 12,267-13,815), the Commission has either overlooked or ignored the fact that the witness made detailed projections for PRR and NYC apart from the national economy. The esteemed economist and former Chairman of the Council of Economic Advisers made traffic projections which evaluated the role of the two carriers in the national economy, and took into consideration many factors, including the commodity composition of the traffic and the prospective growth or decline of industries oriented to railroads.

Witness Keyserling projected the following traffic for applicants:

PRR-NYC TON-MILES (billions)

	1960 (Actual)	1961 (Actual)	1965 (Est.)	1970 (Est.)	
Keyserling	......	......	89	105	
Actual	75.1	72.6	89.2	......	(H-201)

In contrast with witness Keyserling, the plan of merger for applicants was based upon the gloomy and now-discredited forecasts of Professor E. W. Williams:

PPR-NYC TON-MILES (billions)

	1960 (Actual)	1961 (Actual)	1965 (Est.)	1970 (Est.)	
Williams	......	......	69	66	
Actual	75.1	72.6	89.2	......	(H-16, pp. 7-8)

Since both economists had complete data available only for the years 1961, the superior forecasts of witness Keyserling should be given great weight by the Commission in determining the likely posture of applicants in 1970.

Witness Keyserling projected that PRR-NYC ton-miles would rise from 72.6 billion in 1961 to 89 billion in 1965, and to 105 billion in 1970. The actual results for 1965 showed 89.2 billion ton-miles. Witness Williams, on the other hand, projected a decline from 75.1 billion ton-miles in 1960 to a dismal 69 billion in 1965, and a further drop to 66 billion in 1970. The hearing examiners projected an even lower figure of 64 billion in 1970. The report of the Commission, adding the additional two years experience of 1964 and 1965, projects 71 billion ton-miles in 1970. (327 I.C.C. 475, 559) This would be a 20 percent decline from the *present* 89 billion during the next five years, and the Commission's estimate of only 71 billion is far lower than witness Keyserling's higher estimate of 105 billion ton-miles in 1970.

It is grossly erroneous, and a great national tragedy, for the Commission to approve this merger upon the alleged "probability" and "real danger" of economic collapse.

The probative testimony of witness Keyserling has been *proven* by actual experience. The traffic forecasts of the witness should not now be jettisoned in favor of the discredited theories of Professor Williams. Counsel Keyserling stated at the oral argument on October 21, 1965:

> "The examiners projected for 1970 a railroad carriage by the two roads of 64 (billion) ton-miles; they didn't project for 1965. That 64 billion ton-miles is 39 percent below any reasonable projection of what the traffic will be at that time, and 28 percent below what it actually is now.
>
> "I predicted to the opposite and not having time to go into the details, I will say that as of 1964 and as of 1965 my projections as to the income of these two roads was almost on the nose of what is actually happening, particularly allowing for the fact that we are not yet back to full employment, and allowing for the fact that the roads have benefited in part by doing some of the things I have suggested but haven't done them all yet" (Tr. 20,002-3).

In again referring to the projections of the examiners, which in essence were adaptations from witness Williams, the noted Keyserling continued:

> "Now, there is only one way of determining the national interest, one way is by serious studies. I spent a year and a half trying to develop these. I brought them before the examiners in the national interest. They were carefully disposed of despite the fact that every projection made in them turned out to be exactly correct, and every projection upon which the decision was based turned out to be diametrically wrong (Tr. 20,005).
>
> "The railroads now say Keyserling has been right as to 1961-1965, but he may be wrong as to '65-70, therefore take the views of we who have been wrong thus far (Tr. 20,007).

> "We would have to have a great economic calamity during the next five years to make realistic these projections on which the merger is founded, and such a calamity could run so counter to all of our national purposes and objectives that it would mean the ending of the United States as a great power and a great power in world affairs" (Tr. 20,007-8).

The Commission, upon reconsideration, should reject the contractionist theories and hold that the Keyserling projections provide the only realistic expectations for the future.

C. *Recent Earnings*

The Commission states:

> It would be unwarranted to adopt interveners' argument that improved 1964 and 1965 incomes establish an unquestionable trend toward permanent improvement in applicants' finances. Neither the 1964 nor 1965 incomes of PRR approach its 1965 income of $41.545 million or its $41.184 million realized in 1955; while the 1964 and 1965 incomes of NYC fall far short of its $52.284 million income for 1955. Yet we cannot say that 1955 and 1956 were more prosperous for the Nation than 1964 and 1965 have been. (327 I.C.C. 475, 495-6)

The above statement is clearly erroneous in that it is not the 1964 and 1965 incomes that establish a trend. Rather, it is the very comprehensive and detailed studies of witness Keyserling, predicated upon data up to the year 1961, which is the basis for the argument that the examiners, and now also the Commission, are demonstrably wrong. The 1964 and 1965 data only confirm and show proof positive that the former Chairman of the Council of Economic Advisers has the only probative testimony with respect to earnings and tonnage trends.

Furthermore, it is incorrect to state that PRR earnings in 1964 and 1965 fall short of 1955 and 1956. The significant earnings are the consolidated earnings. For example, the net income for the PRR was $50.209 million and $52.520 million in 1955 and 1956, respectively, whereas the PRR earned net income of $60.097 million and $70.113 million, respectively, in 1964 and 1965. This is directly contrary to the impression conveyed in the report of the Commission.

The income of the NYC, on a consolidated basis, was $57.147 million in 1955. (The report does not mention the poorer year of 1956 for the NYC.) The income for the NYC in 1965 was $52.356 million, which is hardly "far short." In fact the 1965 income for the NYC is understated, for comparative purposes, by $2.290 million owing to the recognition of deferred taxes which were not permitted by I.C.C. rules prior to 1962.

D. *Profits on Rail Operations*

The report of the Commission makes a major point of what heretofore was a minor item in the recommended report. This is the notion that applicants did not make a profit on their railroad operations in 1964. A new Appendix F is constructed which purports to demonstrate this, and the finding is given considerable importance elsewhere in the report. (327 I.C.C. 475, 498, 519, 560) The lack of profits from railroad operations is also said to be responsible, in part, for investments in non-transportation property and in the case of NYC, other income was *possibly* the final bulwark against insolvency. (327 I.C.C. 475, 500)

The exceptions of the Delaware & Hudson Railroad Corporation, filed July 12, 1965, completely explode the myth of the Commission in this regard. The D&H exceptions show that the interaction between the applicants and their subsidiaries distorts the inferences of Appendix F. For example, in the case of the PRR, most of the "other income" excluded is derived principally from dividends. Of the $22.4 million dividend income in 1964 shown by PRR, $20 million was received from one subsidiary, the Pennsylvania Company, which primarily holds securities of railroad properties.

Protestant Milton J. Shapp requests the Commission to carefully reconsider its incorrect assertions that applicants did not make a profit on railroad operations. Protestant directs the attention of the Commission to the extensive exceptions of the D&H on this subject, which were not challenged by applicants in their reply. (D&H Exceptions, pp. 40-45.) Moreover, the figures shown in Appendix F do not include the year 1965.

Various statements appearing in the report suggest that the Commission ignored non-railroad income in its financial evaluation of applicants. While the non-railroad income has been overstated, and railroad-derived income understated, the Commission must consider the total income because the antitrust immunity granted by Section 5(11) covers the entire financial complex of applicants. The Commission does not merely have before it a consolidation of railroad properties, but a gigantic amalgamation which includes real estate, pipelines, ranches, and other investments wholly apart from railroading. Accordingly, it is erroneous as a matter of law to ignore these other investments and the income derived therefrom.

E. *Rate of Return.* The report of the Commission gives important consideration ~~to~~ the rate of return on net investment and the rate of return upon net worth in its financial analysis of applicants. (327 I.C.C. 475, 496, 499) The Commission concludes that significant withdrawals of funds from transportation facilities by applicants would become more and more attractive; and that applicants' rates of return have been too low to generate confidence in their financial soundness, to maintain credit, and to raise funds necessary for the discharge of their public duties. (327 I.C.C. 475, 500-1)

The fundamental theory for the merger as a cure for low railroad profits has been refuted by events. Rather than a collapsing of the railroad plant to conform to reduced traffic, the prospects since 1961 are clearly for increased traffic and increased railroad capacity.

Apart from the fundamental change in the economy, however, the report errs in considering rate of return a proper consideration in a section 5(2) merger case. We are not dealing with two failing companies, so that the "failing company" doctrine is inapplicable. *International Shoe* v. *Federal Trade Commission,* 280 U. S. 291 (1930).

The Transportation Act of 1920 fixed a 5.5 percent rate of return as fair value for railroad property, but this was repealed by the 1933 legislation so that there is no directive that the Commission be guided by any rate of return at all, and, of course, there has never been any intention by the Congress to guarantee a rate of return on net worth, since the latter term encompasses non-transportation assets.

The other rate of return comparison, net investment, has been condemned by the Commission. *Increased Railway Rates, Fares, and Charges, 1946*, 264 I.C.C. 695, 721-29. The use of net investment results in a higher valuation than the Commission's elements of value. *Increased Freight Rates, 1951*, 281 I.C.C. 557, 563-5. The use of the carriers' book investment understates recorded depreciation. *Increased Freight Rates, 1951*, 284 I.C.C. 689, 603-13. The recordation of depreciation on road property did not begin until January 1, 1943. The railroads have conceded that there is a defect in their depreciation accounts. A better standard is the use of elements of value under the Ex Parte 175 method, including recorded depreciation and amortization. *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 I.C.C. 633, 654-60. The distinction between net investment and the Ex Parte 175 basis should be noted. *Increased Freight Rates, 1960*, 311 I.C.C. 373, 381, 386.

Apart from the impropriety of the net investment and net worth bases for computing rate of return, noted in the foregoing citations from the Commission's reports, it is incorrect to conclude that this is presently leading or in the future will lead to a withdrawal of funds from transportation facilities. The only reference given by the Commission to support such a proposition is an article in *Traffic World* concerning an investment by the Chicago & Northwestern Railway in a chemical company, with a citation to the same investment transaction in the recommended report of the examiner in F.D. No. 23388, *C&NW Ry. and CGW Ry.-Merger*, served March 3, 1966. (327 I.C.C. 475, 500, Fn. 7-8)

The findings of an examiner in another pending proceeding are of no precedent value, even though the examiner in F.D. No. 23388 is the same as authored the recommended report in this proceeding. The Commission stated in its report on petitions for rehearing in *Northern Lines* (sheet 6):

> It must be borne in mind that the examiner's report is advisory only. The Commission itself ultimately and independently makes its findings based on the record, not on the report of the examiner.

There is no support for the Commission's view that applicants intend to disinvest from railroad facilities because of poor rates of return. Rather, the disinvestment, and collapse of the railroad plant, is encouraged by the Commission's traffic projections and this is the principal justification for the merger itself.

There have been important recent changes in the financial structure of the railroad industry which tend to understate the rate of return for various railroads. These are changes in depreciation schedules, tax laws, and of great importance, the change in financing of railroad equipment acquisitions from direct financing to leasing. (See: Report of R. W. Pressprich & Co. of November 9, 1965: N. Y. Times issue of November 11, 1965, "Rails Map A Shift in Financing.")

F. *"The Financial Community."* The reoprt makes reference to the "financial community" in generol looking upon working capital as one of the signs of financial strength or weakness; Low rates of return, low ratings on bonded debt, low working capital, resort to Government-guaranteed borrowings*—these are among the indicia through which applicants are regarded by the "financial community." (327 I.C.C. 475, 501)

The record contains the statements of witnesses from the First Boston Corp., Morgan, Stanley & Co., and Glore, Foran & Co. on behalf of applicants. (S-2, S-3, S-4) These witnesses did not make the dire statements apparently attributed to them by the Commission with respect to the financial condition of applicants, and the report thus errs in its conclusions with respect to how the "financial community" views applicants.

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*See: Shapp Exceptions, p. 44.

7. The Report Errs in Inferring Any Savings in Operating Expenses from the Merger.

The report of the Commission is extremely vague as to any firm estimate of any expected reduction in operating costs as a result of the merger.

Applicants are said to contemplate a 6 million mile saving in train miles. (327 I.C.C. 475, 490)

Milton J. Shapp has previously pointed out that the basic savings, made possible by rerouting trains and corresponding adjustment of terminals, have evaporated owing to the tremendous increase in traffic since the October, 1961 study of operations. (Shapp Reply to Exceptions, pp. 17-20) Furthermore, the Commission itself has rejected the use of October as a representative month by its decision in *Akron, C & Y R Co.* v. *Atchison T & S E Ry. Co.*, 321 I.C.C. 17, 31 (1963).

The reliability of the October, 1961 study was disputed by witness J. J. Kilgallon of the Commission's own Bureau of Economics, who concluded that the estimated savings in freight service-road cannot be regarded as soundly or reliably based. (S-277)

Since the decision of the Commission does not appear to give very much weight to operating savings, and reaches no positive conclusion in this regard, the Commission upon reconsideration should completely delete any claims for savings. The record, plus intervening traffic growth, have completely destroyed any savings to be achieved through a more intensive utilization of alleged excess capacity.

8. The Report Fails to Impose the Protection Necessary for the City of Erie, Pennsylvania.

The recommended report discussed the injury facing Erie, Pennsylvania (Rec. Rep., pp. 263-4). The examiners concluded (p. 438):

> "As distinguished from the issues relating to the service at the Atlantic Coast Ports, the proposed merger plan contemplates a rerouting of traffic to and from the Port of Erie through Ashtabula, a competing port, which is

> *real terms* would result in an undue and unwarranted change in port relationships. While, as indicated, applicants disclaim any intent to disturb this market relationship, we believe that *the evidence indicates more than a mere suspicion of such injury* and, consequently, the burden is upon applicants to dispel such fears. (emphasis supplied)

The examiners prescribed a condition which has been adopted as condition 15 of Appendix A (327 I.C.C. 475,555):

> "The merged company shall not take any action in adjusting its schedules or service or otherwise which would prejudice the Port of Erie, Pa., in its present competitive relationship with other ports."

The press release of the Commission issued April 27, 1966, however, modifies the protection of Erie. Thus:

> "The Port of Erie, Pa. shall be protected in its present competitive relationships with other ports *served by the merged company.*" (Release No. 53-66, p. 9) (emphasis supplied)

The proxy statement of the PRR, dated June 10, 1966, adopts the language of the press release, but substitutes "Surviving Company" for "merged company." (PRR proxy statement, p. 10)

Apart from the total inadequacy of the condition prescribed to satisfy the finding of harm to Erie, it is important to mention the difference between condition 15 of Appendix A, on the one hand, and the press release, on the other hand, since the Commission is responsible for both documents and both may be relied upon by the parties in construing the order of the Commission.

Condition 15 would appear to give Erie the same protection that it now has under Section 3(1) of the Act, and no more. There is ambiguity in that Section 3(1) condemns "undue or unreasonable prejudice or disadvantage," whereas condition 15 only speaks of "prejudice." Section 3 (1) thus gives

Erie protection against disadvantage, which condition 15 does not provide against, but the prejudice in Section 3(1) is a lesser "undue or unreasonable" than the straight prejudice found in condition 15.

The press release and proxy statement provide for an even lesser degree of protection for Erie because of the requirement that the competing ports must be *served* by the PRR-NYC. This is a word of art in the administration of Section 3(1) and its presence in this proceeding creates ambiguity. *New York Central R. Co.* v. *United States*, 207 F. Supp. 483, 488.

It is now obvious from the language employed by the Commission in its response to the damage facing Erie and the towns lying on the two PRR routes leading north from Pittsburgh to Erie, that the only remedy now is a complete denial of the merger. The brief of the Commonwealth of Pennsylvania suggesting appropriate conditions for the damage shown of record, has been totally ignored along with the exceptions of protestant Milton J. Shapp on this issue. (Shapp Exceptions, p. 30) The Commission, upon reconsideration, is urged to vacate condition 15 and leave Erie with the superior rights it presently enjoys under Section 3(1) of the Act, and thereupon deny the merger because of the irreparable injury to Erie and to intermediate towns shown of record and found by the examiners.

9. The Report Errs in Its Misleading Statements as to the Position of Various Parties.

The petition for rehearing and further hearing of protestant Milton J. Shapp has illustrated the public relations campaign engineered by the Commission itself to gain public acceptance of the merger.

The report of the Commission errs in describing the position of certain parties. These parties are public agencies susceptible to public opinion.

A. *Pennsylvania Communities.* The report fails to show that replies to exceptions were separately filed by the following: City of Shamokin, City of New Castle, County of Lackawanna, County of Beaver, City of Erie and County of Lehigh.

It is possible that the Commission was not apprised of this additional and important opposition. Knowledge of this opposition could have resulted in a modification of the Commission's statement that "much of the early opposition either has become inactive or has been formally withdrawn as in the case of the cities of Pittsburgh, Philadelphia, and New Castle, and the Borough of Ambridge, Pa." (327 I.C.C. 475, 482)

B. *Commonwealth of Pennsylvania.* The Commission makes the extraordinary statement that the Commonwealth, at oral argument, no longer pressed, as it did on exceptions, for certain *conditions*, but *instead* now indicates approval of the merger provided *consideration* be given certain subject matters. (327 I.C.C. 475, 492) (emphasis supplied)

The oral argument of Robert M. Harris, counsel for the Commonwealth, may be found at pages 19,960-19,963, and is directly opposed to the report of the Commission in this regard:

> As the Commission is aware, the Commonwealth of Pennsylvania has indicated approval of the merger here under consideration upon certain *conditions*. It will not be necessary for me to go into these *conditions* in detail at this time and in view of the makeup of the calendar and the fact that the railroads, particularly those in which Pennsylvania is interested, had had prior opportunity eloquently to present their case. I will not indulge in any names or anything of that nature. (Tr. 19,960) (emphasis supplied)

The Commonwealth presented its eight conditions on brief, and these were incorporated both specifically and by reference in its exceptions to the recommended report. If the Commission had been fully apprised of the position of the Commonwealth, which is one of opposition to the merger unless eight conditions are satisfied, it is possible that the Commission would have arrived at a different decision in this proceeding.

C. *U. S. Department of Justice.* The Commission does not clearly recognize the total opposition to this merger by the U. S. Department of Justice:

> "Now after oral argument, the only unqualified opposition to the merger is that of Shapp and various local Pennsylvania political entities jointly represented at oral argument. The Department continues to argue, as it has from the beginning, that the applications should be denied. It now acknowledges, however, that there are factors which may persuade us to approve the merger. . . ." (327 I.C.C. 475, 483)

On the contrary, the Department stated at oral argument:

> "The question before the Commission is whether approval of a Penn-Central merger is compatible with the public interest. To put it another way, when a proper balancing of all the relevant factors which the Commission must weigh in this case is made, can approval be justified? Our answer to these questions is—indeed, must be—that a Penn-Central merger would be contrary to the public interest and approval should be denied. This is the view which the Interagency Committee on Transport Mergers adopted after extensive consideration of the merger and which was developed in detail in our brief to the Examiners. Events since filing of our brief have, if anything, furnished additional support for the correctness of the position we took. (Tr. 19,926-7)

The "conditions" raised by the Department were qualified later in the oral argument:

> "While we do not think that any conditions which might be feasible would adequately cope with the public harm which would be caused by the merger, it is obvious that the adverse impact may be somewhat lessened if some conditions are attached." (Tr. 19,950)

If the Commission had been fully cognizant of the true position of the Department of Justice in this proceeding, the Commission might not have approved the merger.

10. The Report Errs in Evaluating the Adverse Impact of the Merger Upon the Commonwealth of Pennsylvania.

The only findings of the report bearing upon Pennsylvania, other than those for the protection of other railroads serving the State, are as follows:

> "The contentions regarding the adverse effect of the merger on Pennsylvania's economy are not substantiated by the evidence. On this record, the prospects clearly import that the merger will benefit rather than harm the Commonwealth. It will assist in attracting new industries through the applicants' increased ability to meet the needs for specialized equipment, more adequate car supply, new land for industrial development, and expanded transit and stop-off privileges. It will open NYC marketing areas to Pennsylvania industries and will make available improved service from Pennsylvania communities to NYC points in other states. The concentration of maintenance and construction operations in Pennsylvania should bring a net gain of employment to the Commonwealth, which, in the applicants' words, "will in effect become the workshop of the merged railroads." (327 I.C.C. 475, 492-3)

The report makes no findings as to the impact of the proposed merger on any other state—either pro or con. The above findings as to Pennsylvania are not found in the examiners' recommended report, but appear for the first time in the report of the Commission. (The examiners took the position that they were not permitted to measure the impact of the proposed merger upon economic, political or geographic areas, or employment, or individual businesses located therein, and such effects, though none-the-less real, have no jurisdictional significance, citing *United States* v. *Lowden*, Rec. Rep., pp. 282-3.)

The new findings as to Pennsylvania are taken wholly from one paragraph in the reply of applicants to the exceptions of Milton J. Shapp. (Reply of Applicants, pp. 56-7) Reference to the record citations discloses the erroneous conclusions of the Commission.

The increased ability to acquire more railroad equipment and land for industrial development through greater profits hardly offsets PRR witness Patchell's estimate that there will be an overall 17.6% reduction in train miles in the state (S-281, p. 5); or that through business will be diverted from PRR routes in favor of the NYC's water-level route across New York State.

The reference to improved equipment in the report comes from witness Carpi, who was Vice-President of freight sales for the PRR rather than being a financial expert.

The statement of witness Carpi bearing upon improved service from points in Pennsylvania to NYC points is hardly persuasive in view of the limitations of the witness as an operations expert. Furthermore, the report does not quote witness Carpi accurately on this point, for the witness only said that the merged railroad *will be able to provide*, not that the merger "will make available" improved service. The report of the Commission also fails to disclose that witness Carpi really was only speaking of Eastern Michigan:

> "the merged railroad will:
>
> (4) *be in a position* to offer industries transit and stop-off privileges, with industries in Pennsylvania having open to them the marketing areas on what is now the New York Central.
>
> (5) *be able to provide* improved service from points in Pennsylvania to present New York Central points, *particularly to and from the highly industrialized Eastern Michigan.*" (S-285, p. 28) (emphasis supplied)

The statement of the Commission that, *in the words of applicants*, Pennsylvania will become the workshop of the merged railroads, is incorrect. The words, in fact, come from a shipper witness, Grant Arnold of E. J. Lavino & Co., rather than from applicants. This is indicated by reference to S-102, p. 26 shown in applicants' reply to exceptions at page 57. The actual statement of witness Arnold is the typical local Chamber of Commerce slogan, and nothing more:

> "Pennsylvania will benefit from being the workshop of the merged railroad as Greater Philadelphia is the workshop of the world." (S-102, p. 26)

Most significant is the conclusion of witness Arnold, even though he testified in favor of the merger:

> "The impact of the proposed merger on the economy of Greater Philadelphia and of Pennsylvania is by no means a clear open and shut matter on either side. It is difficult to foresee all of the consequences. (S-102, p. 32)

It is one thing to say that the impact upon the economy is irrelevant based upon the legal standards set forth in *New York Central Securities Corp.*, as followed in *United States* v. *Lowden*; It would be a different matter to say that the obvious impact on the Commonwealth of Pennsylvania might be offset by some positive benefits of the proposed merger.

But it is now erroneous for the Commission and contrary to the evidence to find that the merger will benefit rather than harm the Commonwealth, predicated solely upon some isolated statements of witness Carpi outside the area of his expertise and based upon what a shipper witness says will be "the workshop."

Although Protestant Milton J. Shapp disagrees with some of the recommendations contained in the exceptions filed by the Commonwealth on July 12, 1965, it is gratifying to observe that this document makes strong reference to the serious adverse impact that the PRR-NYC merger will have on the economy of Pennsylvania.

> "But perhaps the most serious adverse consequence of the merger is the jeopardy it poses for Pennsylvania's future prosperity. Inevitably the reduction in freight service will place the Commonwealth at a relative disadvantage, with respect to railroad service, in the fierce competition for new industry . . .
>
> "The conclusion is therefore inescapable that the merger, bringing in its wake reduction in train frequency and no improvement in over-the-road facilities, will have a nega-

tive influence upon Pennsylvania's industrial development potential." (p. 7)

The evidence as to the adverse impact upon the Commonwealth is overwhelming. This is the conclusion of the vast preponderance of Pennsylvania witnesses. (Rec. Rep., pp. 256-269; Briefs of City of Philadelphia, Delaware River Port Authority, Commonwealth of Pennsylvania, testimony of Milton J. Shapp, etc.)

11. The Report Errs in Requiring the Citizens and Businessmen of Pennsylvania to Subsidize Their Rivals in Southern New England.

The key to the proposed merger—and to the greatest disaster facing Pennsylvania since the opening of the Erie Canal—is the finding of the Commission that the merger would be disapproved unless the New Haven is taken over by the PRR-NYC. That is, in addition to the loss of railroad competition to the Pennsylvania businessman and the routing of traffic away from the state in favor of the NYC water-level route, the Pennsylvania businessman must now subsidize the bankrupt New Haven Railroad and the commuters in New York State and Connecticut traveling to their jobs in New York City—the arch rival of Philadelphia.

The report is quite clear on this:

> "We find that this merger, without complete inclusion of NH, would not be inconsistent with the public interest, and, accordingly, we will require all the New Haven Railroad to be included in the applicants' transaction." (327 I.C.C. 475, 524)

And again:

> "Accordingly, we find that inclusion of New Haven's freight and passenger operations in this transaction will be consistent with the public interest, and our approval of the merger is conditioned upon such inclusion." (327 I.C.C. 475, 526-7)

Protestant Milton J. Shapp gave warning that the southern New England interests, particularly the State of Massachusetts together with the junior senator of New York State, would attempt to saddle Pennsylvania with the ills of bad management on the New Haven. (Shapp, Reply to Exceptions, pp. 1-5; 6-11) This event simply must not be allowed to take place, and upon reconsideration, by the Commission's own findings, set out above, thereupon disapprove the merger as a matter of law.

The Commission is still very uncertain about the New Haven, yet it is willing to permit the proposed PRR-NYC merger to be consummated immediately. The applicants and other parties are only required to file a plan for "inclusion" by October 27, 1966, unless the latter date is further extended. The word "inclusion" is vague, since it may embrace any of the transactions permitted under Section 5(2), such as the lease of the properties, mere stock control, or something else less than full merger.

The Commission also recognizes that the entire matter is subject to appropriate procedures of the United States District Court under the Bankruptcy Act. The trustees of the NH announced on June 1, 1966 that "there can be no final takeover before the end of 1967." (*New York Times*, June 2, 1966)

It is conceivable that the New Haven will never be included in the merged PRR-NYC; and, at this time, the degree of responsibility that applicants will have for the welfare of the New Haven is not known, even if "inclusion" is ultimately achieved.

The action of the Commission with respect to the New Haven is quite extraordinary. Inclusion of railroads has heretofore been ordered by the Commission on the theory that the main transaction will divert so much traffic from a smaller road that the latter could not survive. No such finding was made herein by the Commission. The only comment by the Commission is a very weak one, which fully recognizes that the NH has difficulties irrespective of a merged PRR-NYC merger:

> "Without some radical change in circumstances, even if this merger application were denied, NH would face a nearly insuperable task in bringing itself out of bank-

ruptcy. The Transportation Company, with new routings and improved service, *could* undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in *perhaps* an irretrievable situation." (327 I.C.C. 475, 522)

The above statement is a far cry from the devastating injury which the Commission finds will harm the E-L and D&H, major railroads serving the Commonwealth of Pennsylvania, and the B&M:

> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger." (327 I.C.C. 475, 532)

The whole basis for the participation of the New Haven in this proceeding was that a merged PRR-NYC system would divert so much traffic from the NH that the latter must be included in the merger. This position has not been substantiated by the record, and the Commission makes no positive finding that inclusion in PRR-NYC is necessary for the survival of the NH.

The requirement for inclusion of the New Haven is thus imposed as part of a desire of the Commission to force an amalgamation of the NH with the PRR-NYC, wholly contrary to the amendments of 1940 to the consolidation provisions of the Interstate Commerce Act. The Commission was relieved of its duty to force a master plan for railroad mergers by the 1940 legislation. Yet the Commission now requires inclusion of the NH apparently in order that the alleged benefits of the merger will outweight the disadvantages.

Inclusion of the New Haven for the purpose indicated is thus contrary to the powers given the Commission by Congress. The Commission is only permitted to pass upon merger plans voluntarily originating with the merger partners, and not to force inclusion of another carrier in the absence of irreparable harm to that carrier which would be caused directly by the proposed transaction.

The interest of the New Haven is *de minimis* compared with other interests affected by the PRR and NYC. The PRR and NYC together transported 84 billion ton miles in 1964, whereas the NH carried only 8 billion ton miles in the same year. Protection of the New Haven is a prime example of the tail wagging the dog. The southern New England interests are asking that the depressed Appalachian region bail out that part of New England which has the highest per capita income of any state in official territory.

In thus requiring Pennsylvania and other states west of the Hudson River to support southern New England, the Commission is acting directly contrary to the Appalachian Regional Revelopment Act of 1965, and the Commission errs as a matter of law in not considering this more recent expression of national legislation affecting transportation. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 79-80. (Shapp Exceptions, pp. 8, 14)

The record will not support any findings that inclusion of the New Haven will result in any positive benefits to that area, and no such findings are made in this regard. As James R. Nelson, Professor of Economics at Amherst College and the key economist testifying in *PRR-NYC* on behalf of the New England Council, puts it in his recently-released study, *Railroad Mergers and the Economy of New England*:*

> "It must be conceded that the whole effect of the merger on New England had to be muffled, and even distorted, for tactical reasons during the presentation of evidence." (p. 181)
>
> "Counsel and witnesses for the New Haven concentrated their attention on the prospect that a Pennsylvania-Central merger would divert substantial traffic from the New Haven. No special attention was paid, by New Haven or other witnesses, to the *positive* benefits which might be gained from new investments in New England railroads." (p. 178)

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*Published by: New England Economic Research Foundation, Boston, Mass., May, 1966, 236 pp. $2.00.

There is thus no justification for finding that inclusion of the New Haven will result in the PRR-NYC merger thereupon becoming "consistent with the public interest." There are no substantial benefits shown of record. Also, the Commission does not find that inclusion is necessary for traffic diversion reasons: this is further evidenced by the absence of any protective conditions during the lengthy period in which the merger is to be in effect without the inclusion of the New Haven because of this railroad's bankruptcy proceedings.

One of the serious legal objections to the order requiring inclusion of the New Haven is that the Commission has not made the necessary subsidiary findings, required by Section 5(2) (b), that the terms and conditions are "just and reasonable."

The Commission errs in not first evaluating whether the terms are just and reasonable prior to determining whether the entire transaction will be consistent with the public interest. The examiners found that operation of the New Haven, if included in the merger, "would impose a persistent and substantial burden upon the merged company, even assuming favorable conditions, for some time to come." (Rec. Rep., p. 352)

Since the amount of the burden is unknown at this time, the Commission cannot weigh the adverse effect upon Pennsylvania shippers of the required subsidy for the New Haven.

The law requires that the Commission make the necessary findings as to the reasonableness of the terms prior to its ultimate finding that the transaction, as thus modified by the condition for inclusion, will be consistent with the public interest. Furthermore, Section 5(2) (c) (2) itself requires that the Commission weigh the effect of the inclusion upon the public interest, which cannot be done until the terms are known. The finding of the Commission that inclusion of the New Haven in the transaction will be consistent with the public interest cannot be a substitute for the findings required by Section 5(2) (b) and 5(2) (c) (2). Indeed, the required finding is not that inclusion of NH will be consistent with the public interest. Rather, Section 5(2) (b) requires that the

PRR-NYC merger, as modified by just and reasonable terms, will or will not be consistent with the public interest.

12. The Report Errs in Concluding the Merger Will Result in a Substantial Improvement in and a Substantial Increased Availability of Equipment for Shippers.

The report is permeated with statements of improved service expected to be made available as a result of the merger. The key discussion, however, is on pages 490-1:

> "For example, from Boston to Cincinnati time will be cut more than 27 percent from the time of either applicant's fastest trains today. From Buffalo to East St. Louis the time saving will be almost 36 percent; Cleveland to PRR's Greenville station in New York Harbor, 25 percent; Chicago to New York, 11 percent; Detroit to Jersey City, 26 percent." (327 I.C.C. 475, 490)

> "By consolidating traffic on fast through trains, minimizing handling and switching of cars and loading, rerouting over the most efficient routes, eliminating certain interchanges, applicants contemplate a 6 million-mile saving in train miles operated. This, combined with the transit-time savings described above, will be the equivalent of substantially increasing the fleet of equipment available to shippers." (327 I.C.C. 475, 490-1)

The alleged service improvement and correspondingly greater availability of car supply is erroneous for the following reasons:

(1) The Commission apparently has selected those movements from Appendix G-5 of the examiners' report which tend to be the most favorable. Moreover, the Commission in expressing the transit time in percentages, has failed to consider how insignificant the actual times are. For example, the Chicago-New York run would only be 4'15" less than the present 38'30" schedule.

(2) The time spent in road train service between major terminals is not the most important aspect of car utilization or movement. Local trains must pick up the loaded car, move

it to a terminal, classify the car, make up the train, etc. The same occurs at the destination end of the journey. The large percentage figures of the Commission do not reflect this fact. As the Association of American Railroads states in its *Yearbook of Railroad Facts* (1966 Ed.), p. 51:

> "The average serviceable freight car on Class I railroads in 1965 moved 51.7 miles per day in line-haul service, almost matching the all-time record of 51.9 miles set in peak war year 1944.
>
> "Movement of 51.7 miles at average freight train speed of 20.1 miles per hour, including stops, would consume 2 hours, 34 minutes, indicating that the average serviceable car spends about 11 per cent of each day in road trains, loaded or empty. The remainder of freight car time is consumed mainly in loading and unloading operations, moving from place to place within terminals, being classified and assembled into trains, or standing idle during seasonal lulls in car demand."

Thus, for the key Chicago-New York run, the best that could be said for increased availability of equipment is that it might be 11% of 11%, or a 1.2% increase in capacity, and this assumes, probably incorrectly, that the only "road" service performed on the shipment is between the two terminals.

(3) The reduction in train miles as a service factor is already accounted for by the Commission in its statement of reduced terminal-to-terminal transit times. The reduction in train miles which may be attributed to the combined superior routes of the merged company, rather than the individual lines of either the PRR or NYC today, are already reflected in the estimated improved transit times. To the extent the reduction in freight train miles is occasioned by filling out lightly-loaded trains with the combined traffic of the two carriers, there will be no reduction in transit time. Rather, the transit time may actually become poorer because of the additional time required to make up a larger train.

(4) The Commission in *Northern Lines* (sheets 20-21) discounted similar allegations of improved service as "specu-

lative" and stated that "competition is a more important factor than consolidation." The same conclusion is warranted in this proceeding. Because so much time is spent in getting a railroad car from the shipper's platform to a road train at a major terminal, the ultimate improvement in total transit time can hardly exceed a generous fraction of one percent. Hardly enough of a time saver to permit a greater availability of equipment.

13. The Report Errs in the Condition That Erie-Lackawanna and Delaware & Hudson May Petition for Inclusion in the Merger.

The report finds that the services of E-L and D&H are essential, that they would be adversely affected by the PRR-NYC merger to a serious degree, that they would be severely handicapped in providing required transportation service to the highly industrialized areas they serve, and that it is doubtful that without inclusion in a major system they could withstand the competition of a merged PRR-NYC. (327 I.C.C. 475, 529, 532)

The Commission prescribes a condition that permits the E-L and D&H to petition for inclusion in the PRR-NYC within a one year period following a final order or judgment denying the E-L and D&H petitions for inclusion in the *N&W-NKP* merger. The Commission theorizes that the E-L and D&H have an established right to obtain first a determination on their petitions for inclusion in the N&W System. (327 I.C.C. 475, 529, 533)

There is no rational support or probative evidence that this condition, providing for inclusion in PRR-NYC, is just and reasonable. Nor is there even any finding in this regard as required by Section 5(2) (b). Inclusion of the E-L, D&H and B&M in the merger would result in frightening monopoly of railroad service in Official territory, particularly in the trunkline and New England regions. The east-west routes through Pennsylvania would be totally monopolized. It is no answer for the applicants to state, upon reply to this petition for reconsideration, that the necessary findings under Section 5(2), the NTP, and the accommodation with the antitrust laws can be considered at such time as the petitions for inclusion in PRR-NYC are actually considered.

The E-L, D&H and B&M could not later force a merger or other affiliation with PRR-NYC because the present Section 5(2) contemplates only voluntary unifications proposed by the parties. It is only by making inclusion a condition to the instant proceeding that the Congressional prohibition against compulsory consolidation can perhaps be circumvented. It is thus mandatory that the Commission support any condition herein with adequate findings that the terms of such condition are "just and reasonable." Further, with respect to any inclusion, the Commission must consider the effect upon the public interest of the inclusion, or failure to include, other railroads *in passing upon the proposed merger of the PRR and NYC.*

The Commission cannot defer these findings until some subsequent and undetermined date. The findings necessary to support condition 9 of Appendix A must be made before the PRR-NYC merger transaction may be authorized. *This,* the Commission has failed to do.

The Commission states that inclusion of E-L, D&H and B&M in either N&W or PRR-NYC has the support of a number of interveners. (327 I.C.C. 475, 529) This is an ambiguous statement, because no substantial party desires inclusion of these carriers in the PRR-NYC merger. The impact of this condition is incalculable. All of the evidence is contrary to the imposition of this condition. It is not just and reasonable, and the Commission has failed to make the necessary findings under Section 5(2) (c) (2).

The danger to the public interest is very real. There is serious doubt as to whether the Commission has the legal power to force the inclusion of major trunk lines into the N&W system. There are strong negative aspects to inclusion of these carriers into the N&W—as the testimony of witness Milton J. Shapp in the N&W inclusion case indicates—and it would destroy needed rail capacity in the Commonwealth of Pennsylvania:

The N&W is not responsible for the traffic diversion facing the E-L, D&H and B&M; Appendix O to the *N&W-NKP* merger case was agreed to by N&W at a time when the PRR controlled the N&W, so that the "compact" referred to by the Commission is in reality a PRR compact to swap the N&W for the NYC; the report of the Commission in the *N&W-NKP* merger case, 324 I.C.C. 1, particularly pages 7, 15, 19-35, does not give the threat of diversion of E-L, D&H or B&M traffic to PRR-NYC as the basis for the imposition of Appendix O in that case. It is thus improper to make any assumption that the E-L or D&H will become either included or affiliated with the N&W system.

Furthermore, the danger of the inclusion condition whereby E-L and D&H might willingly be acquired by PRR-NYC should not be overlooked. There is a natural tendency among railroads to rope off private preserves of non-competitive territory. Inclusion of E-L, D&H and B&M in the PRR-NYC system would give it a virtual monopoly in its own territory. A two-party plan for the East, C&O-N&W and PRR-NYC, would give C&O-N&W a monopoly over the Pocahontas territory.

The E-L, D&H and B&M would appear to be worth more to PRR-NYC than to the N&W because N&W does not presently run east of Buffalo, N. Y. and Connellsville, Pa., whereas E-L, D&H and B&M do provide competition for PRR-NYC, including NH, over a wide area.

The Commission, upon reconsideration, is urged to delete condition 9 of Appendix A as unsupported by the necessary findings and evidence, and a distinct danger to the public interest.

There is no probative evidence to suggest that the eastern district cannot support the existing four-party plan. Also there is no evidence to suggest that viable independents, such as the E-L and D&H, cannot be the favored connection of each of the four major systems in serving off-line competitive points.

CONCLUSION

The decision and report of the Commission is erroneous for the reasons indicated and, in addition, petitioner hereby incorporates herein his exceptions and reply to exceptions to the recommended report to the extent the objectionable findings of the examiners were not reversed by the Commission.

The Commission is requested to reopen the proceeding for the purpose of receiving newly discovered evidence and for rehearing; and to grant rehearing and further hearing; and to reconsider its report of April 6, 1966 served April 27, 1966, and upon reconsideration to deny the merger application.

Respectfully submitted,

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Dated at
Philadelphia, Pa.
July 11, 1966

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document have been served upon all parties of record designated by the Examiners to be served by notices dated December 3, 1963 and January 15, 1964, upon substituted and additional counsel, and upon all additional parties filing exceptions or replies or further petition by first-class mail, postage prepaid.

Gordon P. MacDougall

Washington, D. C.
July 11, 1966

APPENDIX A

CITY OF BALTIMORE

THEODORE R. MCKELDIN
MAYOR

January 10, 1966

Statement of Mayor Theodore R. McKeldin.

FOR IMMEDIATE RELEASE.

I called a meeting in my office this morning with Mr. Stuart T. Saunders, Chairman of the Pennsylvania Railroad, and officials of the Maryland Port Authority. Those present included City Solicitor Joseph Allen and officials of the Greater Baltimore Committee.

The purpose of the meeting was to discuss reports that Mr. Saunders had stated in remarks at New Castle, Pennsylvania, that shipment of some 15 million bushels of grain and some 1.5 million tons of chromium ore would be diverted from the port of Baltimore to the port of Philadelphia.

Mr. Saunders acknowledged at our meeting today that he had made such a statement, but said that it was completely in error, and that, in fact, the Pennsylvania Railroad has no plans for such a diversion.

He also said that steps were being taken to assure officials of New Castle, Pennsylvania, that his earlier statement was incorrect.

At the conclusion of today's meeting, Mr. Saunders issued a written public statement which also denies that the Pennsylvania Railroad has plans to divert the above-mentioned shipments of grain and ore.

Mr. Saunders further stated that he would very much like to see close cooperation develop between the Pennsylvania Railroad and the port of Baltimore, and he gave assurances that the railroad would pursue such cooperation in the future by working closely with the duly constituted representatives of the Mayor of Baltimore and the Governor of Maryland.

I am pleased with the assurances which the Pennsylvania Railroad has this day given the City of Baltimore.